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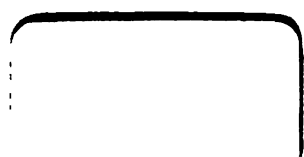
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✓ **REPORTS**
OF
CASES
ARGUED AND DETERMINED
IN THE
Courts of Exchequer
AND
Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY **ROBERT PHILIP TYRWHITT, Esq.**
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

“Ejus (*Analogie*) hæc vis est, ut id quod dubium est ad aliquid simile
quo non queritur referat; ut incerta certis probet.”
Quinct. Inst. Orat. lib. i. c. 6.

VOL. III.
FROM **MICHAELMAS TERM, 3 WILLIAM IV. 1832, TO**
TRINITY TERM, 3 WILLIAM IV. 1833;
BOTH INCLUSIVE.

LONDON:
SAUNDERS AND BENNING, 43, FLEET STREET,
AND
J. & W. T. CLARKE, PORTUGAL STREET.

1834.

✓ R E P O R T S
OF
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ARGUED AND DETERMINED
IN THE
Courts of Exchequer
AND
Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

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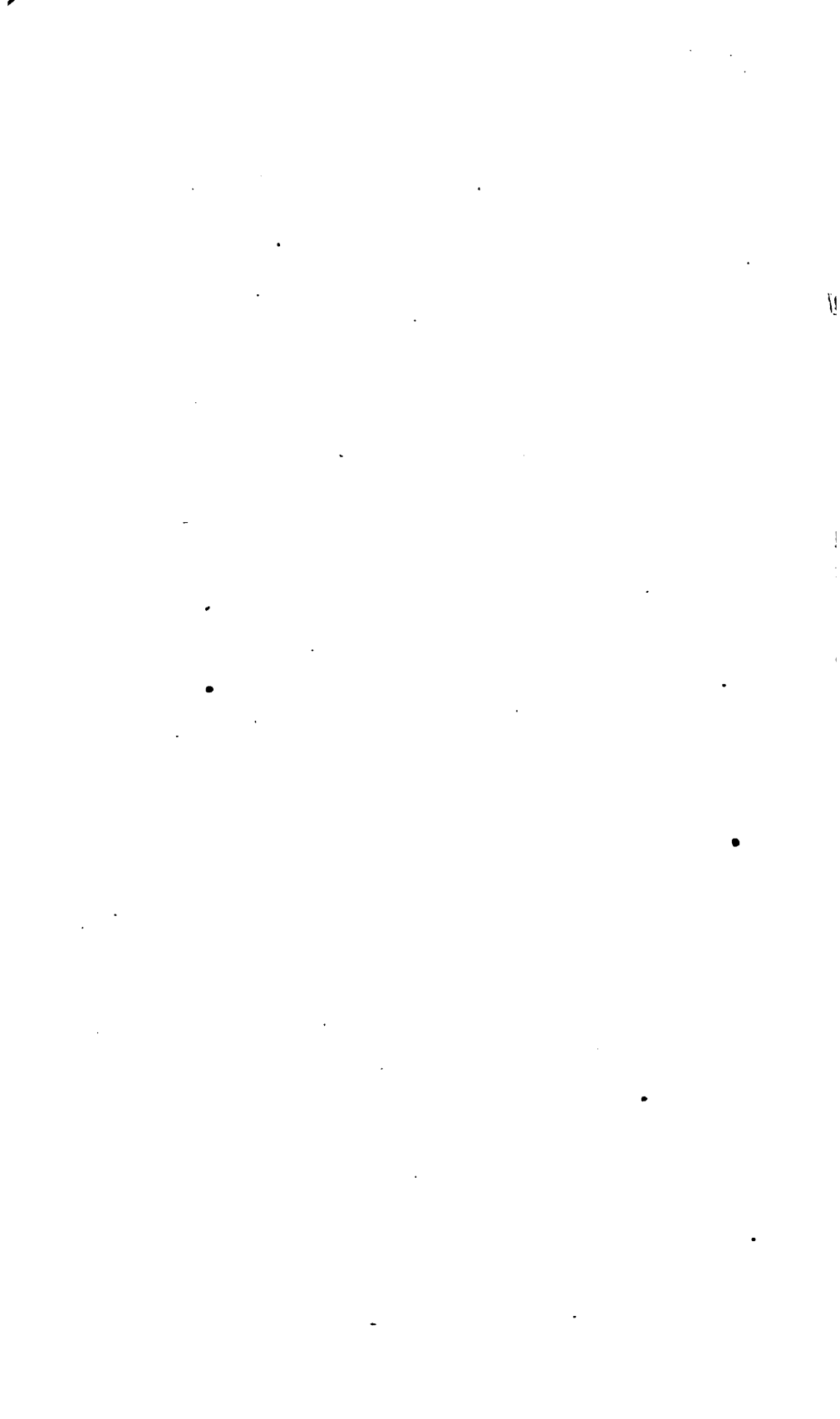


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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

REGULÆ GENERALES (a).

I.

1832.

IT IS ORDERED, That every writ of *summons*, *capias* and *detainer*, shall contain the names of all the defendants, (if more than one), in the action; and shall not contain the name or names of any defendant or defendants in more actions than one.

Writ to contain the name of all the defendants in the action, and of no other defendants.

2. It is further Ordered, That the following fees Fees. shall be taken:—

For signing all writs for compelling an appearance, whether of *summons*, *distringas*, *capias*, or *detainer*, whether the same shall

(a) Made in pursuance of stat. 3 Will. 4. c. 39. s. 14. The marginal notes are added by the reporter.

1832.

Regulæ gene-
rales.

| | |
|--|----------|
| be the first writ or an <i>alias</i> or <i>pluries</i> writ, and whether the same shall issue into the same county as the preceding writ, or into | £. s. d. |
| a different county | 0 2 6 |
| For sealing the same | 0 0 7 |
| For entering an appearance for every defend- ant | 0 1 0 |
| Unless an appearance shall be entered for more than one defendant by the same at- torney, and in that case for every addi- tional defendant | 0 0 4 |

Day of service
to be indorsed
on writ, or
plaintiff can-
not enter ap-
pearance for
defendant.

3. It is further Ordered, That the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made.

Sheriff to in-
dorse day of
execution on
capias.

4. It is further Ordered, That the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

Rule 2 H. T.
1832, [Vol. II.
351.] applica-
ble to new
writs.

5. It is further Ordered, That R. 2 of H. T. 1832 shall be applicable to all writs of summons, *distringas*, *capias*, and *detainer*, issued under the authority of the said act, and to the copy of every such writ.

6. It is further Ordered, That any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county, the plaintiff in such case upon the alias or pluries writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the alias or pluries writ of capias referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

1832.

Regulæ generales.

Alias and pluries writs may be directed into other counties.

Form of.

7. It is further Ordered, That the alias or pluries writ of summons into another county shall be in the following form—

Alias or pluries summons.

William the Fourth, &c.

To C. D., of —, in the county of —, late of —, in the county of [*original county*].

We command you, as before [*or often*] we have commanded you &c. [*as in the writ of summons No. 1 in the schedule of the said act, viz. 2 Will. 4. c. 39.*]

And that the alias and pluries writ of capias shall be in the following form—

William the Fourth &c.

To the Sheriff of —

We command you, as heretofore we have commanded the sheriff of —, that you omit not &c. [*as in the writ of capias No. 4, in the schedule of the said act.*]

Alias or pluries capias.

8. It is further Ordered, That in every writ of distringas issued under the authority of the said act, a *non omittas* clause may be introduced by the plaintiff without the payment of any additional fee on that account.

Non omittas clause in distringas gratis.

9. It is further Ordered, That when the attorney Name of attor-

1832.

Regule gene-
rakes.

ney in the
country to be
indorsed on
writ as well as
name of agent.
[See *Sheppard
v. Skrim*, Vol.
II. 742]
Writ irregular
but not void
for want of
indorsements.

actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

10. It is further Ordered, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act [2 Will. 4. c. 39. s. 12. and schedule,] to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any Judge.

Declaring *de
bene esse* at
end of eight
days after exe-
cution of writ,
where defend-
ant not in ac-
tual custody
on *capias*.
Where one ar-
rested and
others served.

11. It is further Ordered, That upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected. And if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them and declare against him or them in chief, and *de bene esse* against the defendant or defendants who shall have been arrested and shall not have perfected special bail.

Where time to
plead, &c., ex-
pires after 10th
August, the
same time is
to be reckoned
from 24th Oct.
as if the decla-

12. It is further Ordered, That in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for

that purpose after the 24th day of *October* as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c. (See 2 *W. 4. c. 39. s. 11.*)

1832.

Regulæ generales.

ration, &c., had then been delivered.

No further rule to plead.

If order to return writ in vacation be made a rule of Court, next term an attachment may issue without service of that rule.

13. It is further Ordered, That in case a Judge shall have made an order in the vacation for the return of any writ issued by authority of the said act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit*, on any day in the vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time. (See 2 *W. 4. c. 39. s. 15.*)

14. It is further Ordered, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order. (See 2 *W. 4. c. 39. s. 17.*)

Writs issued without authority of attorney whose name is indorsed to be stayed.

15. It is further Ordered, That every declaration shall in future be intituled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows—

Title of declaration.

Declaration after Summons.

[*Venue.*] *A. B.* by *E. F.* his attorney, [*or, in his own proper person*] complains of *C. D.* who has been summoned to answer the said *A. B.* &c.

Commencement by summons.

1832.

Regulæ generales.

Commencement of declaration on capias where defendant is not in custody. Commencement of the declaration on capias where defendant is in custody.

Declaration after Arrest where the Party is not in Custody.

[*Venue.*] *A. B.* by *E. F.* his attorney, [or, in his own proper person] complains of *C. D.* who has been arrested at the suit of the said *A. B.* &c.

Declaration where the Party is in Custody.

[*Venue.*] *A. B.* by *E. F.* his attorney, [or, in his own proper person] complains of *C. D.* being detained at the suit of the said *A. B.* in the custody of the sheriff [or, the marshal of the *Marshalsea* of the Court of *K. B.*, or the Warden of the *Fleet.*]

Declaration after the Arrest of one or more Defendant or Defendants and where one or more other Defendant or Defendants shall have been served only and not arrested.

Commencement of declaration against several defendants, some of whom have been arrested and the others served.

[*Venue.*] *A. B.* by *E. F.* his attorney, [or, in his own proper person] complains of *C. D.*, who has been arrested at the suit of the said *A. B.* [or, being detained at the suit of the said *A. B.*, as before,] and of *G. H.*, who has been served with a writ of capias to answer the said *A. B.* &c.

Pledges discontinued.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

II.

Writs into the counties palatine of *Lancaster* and *Durham*.

It is Ordered, That the writ of capias and distringas which shall hereafter be issued out of the Superior Courts of law at *Westminster* into the counties palatine of *Lancaster* or *Durham* shall be directed to the Chancellor of the county palatine of *Lancaster* or his deputy there, or to the Bishop of *Durham* or his Chancellor there, and shall be in the following form—

Writ of Distringas.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster* or his deputy there [or, “To the Reverend Father

in God —, by divine providence, Lord Bishop of *Durham*, or to his Chancellor there,"] greeting—We ^{1832.}
 command you that by our writ under the seal of our <sup>Regule gene-
 rales.</sup> said county palatine, to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [*or, if in Durham*, that by our writ under the seal of your bishoprick, to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded], that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of 40*s.* in order to compel his appearance in our Court of— to answer *A. B.* in a plea of trespass on the case [*or, debt, as the case may be*], and how he shall execute that our writ he make known to us in our said Court on the — day of — now next ensuing.

Witness —, at *Westminster*, the — day of —, in the — year of our reign.

Notice to be subscribed to the foregoing Writ.

In the Court of —.

Between *A. B.* plaintiff, and *C. D.* defendant.
 Mr. *C. D.*

Take notice that I have this day distrained on your goods and chattels in the sum of 40*s.* in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons, bearing teste on the — day of —, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [*if the defendant be subject to outlawry*] will cause proceedings to be taken to outlaw you.

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Regulæ gene-
rales.*Writ of Capias.**William the Fourth, &c.*

To the Chancellor of our county palatine of *Lancaster*, or his deputy there, [*or*, "To the Reverend Father in God —, by divine providence Lord Bishop of *Durham*, or to his Chancellor there,"] greeting— We command you that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [*or, if in Durham*, that by our writ under the seal of your bishoprick, to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.*, of —, if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises, [*or*, of debt &c.] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody: And that he further command him, that, in execution thereof, he do deliver a copy thereof to the said *C. D.*; and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of — to the said action; and that, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunto written or indorsed thereon; and that he further command the said sheriff, that, immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner

if he shall be thereto required by order of the said Court, or by any Judge thereof. Witness —, at Westminster, the — day of —

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Regulæ generales.

Memorandum to be subscribed to the Writ.

N. B. This writ is to be executed within four calendar months from the date hereof, including the day of such date, and not afterwards.

Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the stat. 7 & 8 G. 4. c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond.

4. If a defendant, having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £ —, by affidavit.

Or,

Bail for £ —, by order [*naming the Judge making the order*] dated the — day of —.

This writ was issued by *E. F.* of —, attorney for the plaintiff [*or plaintiffs*] within named.

Or,

This writ was issued in person by the plaintiff within named [*mention the city or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*]

(Signed by all the Judges.)

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In the matter of the Estate and Effects of CATHERINE
CHOLMONDELEY, deceased.

By a marriage settlement 20,000*l.* was vested in trustees on trust to pay the interest to the father of the wife for his life, after his death to the husband for life, with remainder to the wife for her life, with a power of appointment among her children, if any, and in default of issue, then on such trusts, and subject to such direction and appointment as she should make by will, in case she died in her husband's lifetime, or by deed or will in case she should survive her husband, and in default of such appointment by her, in trust for her next of kin. The wife died in the lifetime of the husband, having by her will appointed the above sum to certain described persons:—Held, that legacy duty was payable in respect of it.

BY an indenture bearing date 7 April 1814, and made between Sir *Philip Francis* and *Catherine Francis*, his daughter, of the first part, *G. J. Cholmondeley* of the second part, *Alexander Baring*, *Philip Francis*, *George James* Earl of *Cholmondeley*, and the Right Honourable *Charles Arbuthnot*, of the third part, it was recited that a marriage was intended to be had and solemnized between the said *Catherine Francis* and *George James Cholmondeley*, and it was agreed by the parties to the said indenture, that the said *A. Baring*, *P. Francis*, &c., their executors, administrators and assigns, should stand and be possessed of the sum of 20,000*l.* in the said indenture mentioned, and the interest thereafter to accrue due thereon, upon certain trusts in the said indenture mentioned, for the benefit of the said Sir *P. Francis* during his life; and from and after his decease for the benefit of the said *G. J. Cholmondeley* during his life; and from and after the decease of the survivor of them, the said Sir *P. Francis* and *G. J. Cholmondeley*, for the benefit of the said *C. Francis* during her life; and from and after the decease of the survivor of them the said Sir *P. Francis*, *G. J. Cholmondeley* and *C. Francis*, upon certain trusts in the said indenture mentioned, for the benefit of the issue of the said then intended marriage, in case there should be any such issue. And it was by the said indenture agreed and declared between the parties thereto, that in case there should be no child of the said *G. J. Cholmondeley* by the said *C. Francis*, his then intended wife, or in case there should be no child who should arrive at the age of twenty-one years, or be married if a daughter, then and in such case the said

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A. Baring, P. Francis, &c. their or his executors, administrators and assigns, should stand possessed of and interested in the whole of the said sum of 20,000*l.* upon and for such trusts, intents and purposes, and subject to such powers, provisoes, conditions, and declarations, as the said *C. Francis*, notwithstanding coverture, during the joint lives of herself and the said *G. J. Cholmondeley*, by her last will and testament in writing, or any testamentary instrument or appointment in the nature of a will, or any codicil or codicils thereto, to be by her signed and published respectively in the presence of and to be attested by two or more credible witnesses, or as the said *C. Francis* in the event of her surviving the said *G. J. Cholmondeley*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by her after the decease of the said *G. J. Cholmondeley* sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by her last will and testament, or appointment in the nature of a will, or any codicil or codicils thereto, to be by her signed and published respectively, in the presence of and to be attested by the like number of credible witnesses, should direct or appoint. And in default of any such direction or appointment, and so far as any such direction or appointment should not extend, it was thereby declared and agreed that the said *A. Baring, P. Francis, &c.* their executors, administrators and assigns, should stand possessed of and interested in the whole of the aforesaid sum of 20,000*l.* and the interest or annual proceeds thereof, in trust for such person or persons as would, at the decease of the said *C. Francis*, be entitled to her personal estate as next of kin, according to the statutes for the distribution of the personal estate of persons dying intestate, if the said *C. Francis* had died intestate and without


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having been married. The said sum of 20,000*l.* was the property of the said Sir *P. Francis*. The marriage took place shortly after the date of the above indenture, but there were no children. Mrs. *Cholmondeley* afterwards duly made the will and codicil next following, and afterwards died, leaving her husband, Mr. *Cholmondeley*, her surviving.

“ This is the last will and testament of me *C. Cholmondeley*. Whereas I am by my marriage settlement empowered in circumstances therein described to dispose of the sum of 20,000*l.* I hereby give, subject to the provisions of the settlement, one moiety thereof to my beloved husband, and direct the other moiety to be distributed as follows: To my niece *M. E. Johnson* 4000*l.*, to my niece *C. Johnson* 1000*l.*, and further I bequeath the sum of 5000*l.* to *J. W. Warren*, Esq. and *J. Angerstein* of *Cumberland place*, Esq., in trust, that they pay the annual proceeds thereof in moieties to my brother and his wife *Eliza*, during their respective lives, the portion of the latter to be received and enjoyed by her independently of my brother, or of any other husband with whom she may hereafter marry. And further, that on the death of my brother or his wife *Eliza*, his or her moiety shall be paid to the survivor during his or her life, to be held by them respectively in like manner as their original moieties, and that at the death of such survivor they my said trustees divide the capital of the said 5000*l.* between such of the daughters of my said brother and his wife *Eliza* as shall be living, the share of each to be paid to her on her coming of age, or being married with consent of guardians, and the shares of such as may die under age and unmarried, to be added to the shares of the survivors, and be considered as part of their original shares; and if it shall eventually happen that any part of the last mentioned moiety of the said

20,000*l.* shall not be herein disposed of, I give the same, together with all other property which may be mine, either in possession or reversion, to my beloved husband, whom I constitute my residuary legatee and sole executor.

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Catherine Cholmondeley.

Witness, *Katherine Dunkinfield.*

J. Lloyd Dunkinfield.

November 13, 1820."

The following was the codicil.

"Codicil to my will. Whereas, by the recent decease of my dear niece *Catherine Johnson*, the legacy of 1000*l.*, which I bequeathed to her in my will, is become void. I now direct that the said 1000*l.* be equally divided between my dear sister *M. Johnson* and my niece *M. E. Johnson*.

Catherine Cholmondeley.

April 5, 1822."

Administration, with the will and codicil annexed of *Mrs. Cholmondeley*, was afterwards granted to *Earl Romney* and *Lord Braybrooke*, the executors of the will of *Mr. Cholmondeley*, who, having survived his wife, died on or about 5 November 1813, without having proved her will.

An order grounded on 42 *Geo. 3. c. 99. s. 2.* was obtained against the above administrators, and also against Messrs. *A. Baring, Francis, and Arbuthnot*, the trustees for the execution of the will, for not accounting for legacy duties on an affidavit stating the above facts.

Temple and *P. H. Abbot* for the administrators, showed cause against the order being made absolute. It will be argued that the testamentary disposition of *Mrs. Cholmondeley*, being an appointment at her will and pleasure, constitutes a legacy under 55 *Geo. 3. c. 184. schedule No. III.* The wording of the existing

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law affords a distinction from that of preceding enactments, which relieves the administrators from much of the difficulty which might have otherwise arisen; for the schedule of 55 *Geo.* 3 makes the legacy duty chargeable as follows.

“For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th *April* 1805, either out of *his or her personal or moveable estate*, or out of any monies to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged, after the 31st *August* 1815.”

Is this disposition a “will or testamentary instrument” of personal estate of the testatrix, so as to incur the above duty? Now, first, the property disposed of was not personalty applicable as assets for payment of *Mrs. Cholmondeley’s* debts. The legal interest in it was in the trustees of the settlement, and the objects of *Mrs. Cholmondeley’s* appointment take not by her testamentary disposition, but under the settlement. Now had 45 *G. 3. c. 38.*, the duties in which are repealed by 55 *G. 3. c. 184.*, remained in force, the case would have been more difficult; for while the existing act strictly confines the duty in respect of legacies, to legacies given by will or testamentary instrument “out of the personal estate of the testator,” 45 *G. 3. c. 38.* enacted, by section four, that every gift by will or testamentary instrument of any person dying after the passing of this act which by virtue of any such will, &c. shall have effect or be satisfied out of the personal estate of such person so dying, *or out of any personal estate which such person shall have power to dispose of as he or they shall think fit (a).* The object of 45 *G. 3.*

(a) Omitted in 55 *G. 3. c. 184.*

was to prevent testamentary gifts from being made under the form of appointments in pursuance of trust deeds, so as to defraud the revenues arising from legacy duty; then the fact that this money was vested in trustees in order to secure Mrs. *Cholmondeley* against particular risks, and for no purpose contemplated by the legacy acts, would have exempted this property from duty even under that act.

The question then is this—Does this power of appointment give the party in whom the authority to appoint is vested, such an absolute interest in the property to be disposed of as will make it the personal estate of that party? Now if personalty is given to trustees for such purposes as *A. B.* shall by deed or will appoint, and an appointment is accordingly made under such general power, the property passes to the appointee, subject in his hands to payment of such previous claims of the creditors of *A. B.* as would have been payable out of his personal estate. Such appointee is considered as a trustee for the creditors to the extent of those claims. But the executor of the appointor need be no party to the bill of the creditors, for they take it, not as his personal assets, but charge the appointee as their trustee in equity in respect of a benefit given to him which ought to be given to them: see per Sir *John Leach*, in *Jenney v. Andrews* (a). That doctrine of equity rests on the absolute vesting of the personalty in *A. B.* the appointor, which subjects it to the demands of his creditors, though a general power of appointment has been exercised in favour of particular persons; but it does not apply to a case like the present, where not only had Mrs. *Cholmondeley*, the testatrix, no interest in or power over the fund during her lifetime, but would have had no power of disposing of it by will had she had children. Again, this is a stronger case

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(a) 6 Madd. R. 264.

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than *Bradley v. Westcott* (a), for here a preceding estate in the husband intervened. Then the rule of equity, that where personalty is given to *A.* for life, then to *B.* for life, remainder to *C.* for life, remainder to such persons as *B.* shall appoint, it is only considered as property subject to the mere performance of a trust by the appointor, and not as his personal estate, liable to the payment of his debts. *Bradley v. Westcott* recognized that distinction. Personalty was there given by the terms of "all personal estate" for the sole use of the testator's wife for life, to be at her disposal during her life, and to such persons as she should appoint after her death by her will. She appointed and bequeathed by will "all my personal estate" and "all my estate and interest therein" generally to trustees; and the question was, whether, under such a description, the above personalty, subjected to a general power of disposal, did or did not pass to them as the personal estate of the testatrix; and the court held that they did not. [*Bayley* B. As her appointment did not refer to the power, the will operated not under it, but exclusively of it.] Sir *W. Grant* said, "the distinction is perhaps slight which exists between a gift for life with a power of appointment superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But the distinction is perfectly established, that in the latter case the property vests. A gift to *A.*, and to such persons as he shall appoint, is absolute property in *A.* without an appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to any thing. If that distinction exists it is impossible that the power can be executed by the very words by which property is given." That

(a) 13 Vesey, 445.

passage recognizes the doctrine contended for, which is also to be found in *Lovell v. Knight* (a). In this case the ultimate limitation of the settlement was to the next of kin of Mrs. *Cholmondeley*: had Mrs. *Cholmondeley* made no appointment, her next of kin would have taken under the settlement, exactly as if it had been given to them by name and by no testamentary disposition. The abandonment of the probate duty by the crown is a tacit admission that this is not that "personal estate" of the appointor on which that duty is imposed. Then unless the counsel for the crown can show some distinction by which duty is chargeable on a legacy of property which is not liable to probate duty quâ personal estate, a legacy in the ordinary terms of Mrs. *Cholmondeley's* personal estate, is necessarily of personal estate, and as such is liable to probate duty.

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Loundes and *Follett* for the trustees of the settlement. The trustees appear here by agreement with the crown officers, but none of the legacy duty acts compel them to do so or authorize the crown to proceed against them in any manner. Supposing that this were a legacy liable to duty, no means of recovering it are provided, which affords the inference that it was not intended to be imposed in this case. The act 42 G. 3. c. 99. s. 2. only gives power to call on executors and administrators to account. Stat. 36 G. 3. c. 52. s. 5. and its schedule, show that according to the form of the receipt provided by the latter, the receipt is for a legacy received out of the personal estate of the deceased. Sect. 6 enacts, "that the duties hereby imposed shall in all cases in which it is not hereby otherwise provided, be accounted for, answered and paid by the person or persons having or taking the

(a) 3 Sim. R. 275.

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burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and also upon making payment or other satisfaction or discharge whatsoever of any legacy or any part of any legacy, or of the residue of any personal estate or any part of such residue, to which any other person or persons shall be entitled." Then the persons designated by the act are those who have taken on them the burden of the will. The executors of the husband could not "retain or pay;" but it is only out of such payment or retainer that the legacy duty is payable. Then if an information is filed by the crown against the trustees, they may dispute the authority so to do, as assumed without warrant by any enactment. If *Mrs. Cholmondeley* had made no will, the next of kin would have taken under the settlement, free of legacy duty. The 45 G. 3. c. 28. s. 4. first imposed legacy duty on legacies charged on real estate, so that it became necessary to make the trustees of a real estate liable to duty, they having control over the estate. Now in *Attorney-General v. Jackson (a)* it was held, that trustees, in order to be liable, must have control over the estate, and have power to retain; but there is no such provision in the schedule No. III. of 55 G. 3. c. 184. under which the crown here proceeds. Then the duty does not attach under the existing act, for this is not "given out of Mrs. C.'s personal or moveable

(a) *Ante*, Vol. II. 50.

estate," nor is it "charged upon her real estate." (a) [Lord *Lyndhurst* C.B. The words contained in 45 G. 3. and which might have applied, are now omitted in 55 G. 3. The duties are only payable at present under the latter act, but the words may have been omitted on the supposition that they were unnecessary, and that those which remained were sufficient, and of a like import.] But under either act can the gift of an estate apply to the execution of a power where the property is taken by the appointees, not under a will, but under a marriage settlement?

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The *Solicitor-General* (Sir *W. Horne*), *Amos*, and Sir *George Grey*, for the crown. Are the sums given by the testamentary instrument executed by Mrs. *Cholmondeley*, "legacies" within this act for the purposes of revenue? First, the crown must show this to be a testamentary instrument; and if it is established to be such, is it a will "giving" a part of the property, or an execution of a power of appointment alluded to by the statutes, and therefore subject to legacy duty? Now the words of the schedule No. III. of 55 G. 3. c. 184. are not to be construed in the limited manner contended for; for stat. 36 G. 3. c. 52. shows clearly that a duty is imposed, not only on that which is absolutely the personal property of the testator, but also on property over which he executes a power, by an instrument which taken per se is not merely his will, though with-

(a) 55 Geo. 3. c. 184. Schedule, No. III. being, "For every legacy specific or pecuniary, or of any other description of the amount or value of 20l. or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th April 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged, after the 31st August 1815."

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out it nothing would pass to the legatee. Though the amount of duties given by 36 G. 3. c. 52. be altered, the legislative declaration of what a legacy is, is contained in sections 2 and 7, and is still law. The latter section explains the legacies on which the duty is intended to be laid by the former and enacting clause, and without making a new provision interprets and defines the meaning of the words in that section, "legacies given by will or testamentary instrument out of the personal estate of the deceased," to be, not only those which are payable out of the personal estate, strictly so called, of the deceased, but those also which are payable out of the personal estate which the party had power to dispose of. Now the terms in which the duty is imposed in the schedule of 55 G. 3. c. 184. coincide with sect. 2 of 36 G. 3. c. 52., which imposed duties as follows:—"Upon every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, *out of the personal estate of the person so dying*, and also upon the clear residue and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear yearly value of 200*l.* or upwards, which shall remain after deducting debts, funeral expenses, and other charges and specific and pecuniary legacies, if any, whether the title to such residue, or to any part thereof, shall accrue by virtue of any testamentary disposition or upon intestacy," (amount of duty);—with a proviso that the act shall not extend to charge with any duty any legacy or residue of any personal estate given or passing to or for the benefit of the husband or wife of the deceased, or of any of the royal family. Then these enacting words being repeated in the schedule of 55 G. 3. must be

construed in the sense in which they are explained in 36 G. 3. c. 52. s. 7. viz. that any gift by will or testamentary instrument, which shall by virtue thereof have effect or be satisfied out of the personal estate of such person so dying, *or out of any personal estate which such person shall have power to dispose of as he or she shall think fit*, shall be deemed and taken to be a legacy within the meaning of that act. Then the omission of the words in italic out of the 44 G. 3. c. 98. sched. A., 45 G. 3. c. 28. s. 1., and 48 G. 3. c. 149. sched. part III. does not exempt Mrs. *Cholmondeley*'s legacies from duty; for sect. 7 of 36 G. 3. c. 52. expounds the terms which, as used in sect. 2 of that act, correspond with the schedule of 55 G. 3. by showing that legacy duty attaches on personal estate of which the testatrix had the disposition within sect. 7.

Again, the proviso in 36 G. 3. c. 52. s. 2. for exempting from duty a gift or devolution from the wife to the husband, or vice versâ, is repeated in the schedule of 55 G. 3. That shows that but for the provisoes in those acts such a gift would have been liable to duty. Now as such a legacy could only be given by means of a power, those acts include the present case. But the words of 55 G. 3. "his or her personal estate," are sufficient to include the 20,000*l.* settled by the father of Mrs. *Cholmondeley*; for it is personalty of which she might dispose. The objects of the settlement were to provide for Mrs. C. during her life, for her issue, if any, and, subject to them, to let the sum settled be considered her property absolutely, to be liable to her disposal by will on her death without issue. Her legatee might file a bill for his legacy, not directly against the trustees of the settlement, but against the executors or administrators of Mrs. *Cholmondeley*, who had died without proving her will, as representing her personal estate. The executors might then file a bill against the trustees,

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praying that the trusts of the settlement may be executed, and that the money settled should be paid to the executors, who as such were legally entitled to claim the personal estate by the probate or administration which the will annexed granted to them. It may happen that the crown has no remedy against the trustees for the legacy duty, unless they chose themselves to pay the legatees; in which event they would be fixed as executors of the will, and liable to legacy duty as such. It appears from *Sugden on Powers*, 337, 5th edit. that though a will of a married woman under a power which could only be exercised by will, cannot be revoked by deed of a subsequent date, it is in other respects analogous to a will executed without such power. Both cases equally require that a probate or administration shall be taken out, so as to entitle the representative to claim the personalty in order to perform the testator's directions; then he, not the legatee, must sue the trustee as a debtor to the estate.

Cur. adv. vult.


Lord LYNTHURST C. B. afterwards delivered the judgment of the court.—This was a question arising out of stat. 55 G. 3. c. 184. imposing duties on legacies. The facts of the case were these: Upon the marriage of Mrs. *Cholmondeley* the sum of 20,000*l.* was vested in trustees, upon trust, as far as related to the income arising out of that money, to her father for life, and to her husband for life; and, in the event of her surviving, to her for life; and in the event of her having no children, with a power to her to appoint that sum of money. The result was, that she had no children, and she made a testamentary appointment, conformably to the authority that was thus given.

The question is, whether money taken under that

testamentary appointment is subject to the legacy duty imposed by 55 G. 3. c. 184. By the schedule annexed to 55 G. 3. c. 184. the duty is imposed upon every legacy payable out of the personal estate of the testator. It was contended at the bar, that this was not a legacy payable out of the personal estate of the testator, and therefore that it did not come within the words or within the meaning of the act, and that the duty therefore was not payable. In order to come to a right conclusion upon this subject, it is necessary to advert to the previous acts imposing duties upon legacies. The three first acts, 20 G. 3. c. 28., 23 G. 3. c. 58., and 29 G. 3. c. 51., impose the duties upon a receipt or acquittance given upon the payment of legacies left by any will, in general terms; leaving the court to define what was intended by the word "legacy" within the meaning of those acts of parliament. In the next act, namely, 36 G. 3. c. 52. it is enacted, by the clause imposing the duty, that the duty shall be payable upon all legacies paid out of the personal estate of the testator. But in the seventh section of that act there is a declaration of the legislature as to what is to be deemed a "legacy" within the meaning of the act. By that section it is enacted, that all gifts payable out of the personal estate of the testator, or out of the personal estate which the testator has the power of disposing of, shall be deemed and considered a "legacy" within the meaning of this act of parliament. The legislature, therefore, in the act itself, interpreted and defined what is meant by a "legacy payable out of the personal estate."

The next act is the 44 G. 3. c. 98., and by that act there is no provision corresponding with that to which I have adverted in the seventh section of 36 G. 3. c. 52. describing what the legislature meant by the term "legacy" within the meaning of that act. However, if the question had arisen upon the 44 G. 3. I should

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have been of opinion, that as the legislature had in the previous act defined what is meant by the term "legacy," it would be considered that the legislature used that term (the act being passed in *pari materiâ*) in the same sense and to the same extent in which it had been used in the previous act; and it appears to me obvious, that this must have been the meaning of the legislature, because the object of the act of 44 G. 3. was to consolidate the regulations and provisions of the previous act, and to consolidate the duties. There is no intimation whatever in the 44 G. 3. that there was any intention to reduce the duties; that leads therefore, I think, fairly to the conclusion, that the legislature could not have intended, under the term "legacy," to give a more limited meaning to that term than it had in the 36 G. 3.

There is another circumstance also which leads to the same conclusion, namely, that by the 45 G. 3. c. 28. which was passed the following year, the duty is given payable upon legacies out of any real or personal estate of the testator. In the 45 G. 3. there is a clause similar to the seventh section of 36 G. 3. c. 52. defining what the legislature means by the term "legacies;" and in that description it states, that any gift payable out of the personal estate, or out of any personal estate which the testator has the power of disposing of, shall be considered a "legacy" within the meaning of that act. So that under the 36 G. 3. and under the 45 G. 3. the legislature has distinctly defined what is meant by the term "legacy;" and it seems impossible to come to a conclusion that in the intermediate act of the 44 G. 3. it intended to give a different interpretation to the term, or that it should have less effect than in the previous and subsequent acts. I should think, therefore, it is perfectly clear under the 44 G. 3. that the term "legacy," meaning any legacy payable out of the personal estate

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of the party dead, would not only extend to a legacy properly payable out of that personal estate, but to a legacy payable out of any property which the party had the power of disposing of by will. If that be so, the language of 48 G. 3. is the same in substance as that of 44 G. 3., and the language of the 55 G. 3. is the same as that of 48 G. 3.

Taking all the acts, therefore, together applicable to the same subject, and passed in *pari materia*, the legislature, in the 36 G. 3. and the 45 G. 3. having described and defined what they meant by a "legacy," and having given no such description as to the intermediate act of 44 G. 3., but it being obvious what their meaning was with respect to that act, it seems impossible to come to a conclusion that they meant to use that term in a more limited sense in the 48 G. 3. and the 55 G. 3. If that be the true meaning of that act of parliament, it will follow that under 55 G. 3. c. 184. the duty would be payable not only upon a legacy payable out of the personal estate, strictly so considered, of the testator, but out of any personal estate which the testator had the power of disposing of as he or she may think proper. That would apply to the present case.

We are of opinion, therefore, that, considering all these acts together, the duty is payable in respect of this property which was taken by the appointees under the will of *Mrs. Cholmondeley*.

Order made absolute.

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Declaration stated (in four counts) that plaintiff was possessed of a farm on which

ASSUMPSIT. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the promise and undertaking of the defendant, were certain crops then growing, and on which the plaintiff had bestowed certain work and labour, and used certain materials in making the same ready for tillage; and of which work and labour, plaintiff, at the time of making the promise in the declaration, had not derived the benefit—That in consideration that the plaintiff would let the farm to the defendant for 14 years, the defendant undertook to take the said crops and pay for them, and for the said work, labour and materials, according to a valuation to be made by certain persons. *Afterments*—that plaintiff let the farm accordingly, and left the said crops so growing and being thereon—that the defendant took possession of the farm and crops, and had the benefit of the work and materials, and took the crops to his own use—that the valuation was made at 147*l.*—that defendant was requested but did not pay.

Plea, that the crops and the benefit of the work &c. were not excepted or reserved out of the letting or agreement to let, and that no agreement in writing in respect of the causes of action in the above counts mentioned, or any memorandum or note thereof, wherein the said promises of the said defendant in those counts were stated or shown, was in writing signed by the defendant, or any other person thereunto by him lawfully authorized.

Held on demurrer, that as by the contract the defendant was to have had the land as well as the crops then growing on it, and as the labour and materials were so incorporated with the land as to be inseparable from it—the rights to the crops and to the benefit of the work and labour were both of them an interest in the land within the statute of frauds, 29 *Car.* 2. c. 3. s. 4.

Another count stated a promise to manage a farm in a good and husbandlike manner, and according to the custom of the country. The breach was, that he did not manage &c. (in the words of the promise), but on the contrary managed it in a bad and unhusbandlike manner, contrary to the custom of the country where the farm was:—*Semle* on special demurrer that the breach was sufficiently assigned, but amendment by inserting the particular facts was recommended.

Indebitatus assumpsit count for crops bargained and sold, and under and by virtue of such bargain and sale accepted and taken, and had and received and cut down by the defendant. *Plea*, that the crops, at the time of the bargain and sale, were growing on and affixed to certain lands belonging to and in possession of plaintiff; and that while they were so growing and affixed, and just before the said bargain and sale, there was a treaty on foot between plaintiff and defendant, by which it was proposed that plaintiff should let the said lands to defendant for 14 years, and that defendant should take the lands for that term, and therewith should take the said crops—that plaintiff and defendant assented to the treaty, and that in order to carry its terms into execution the supposed bargain and sale was verbally contracted between them, but that there was no agreement in writing, or any memorandum or note thereof.

Held (on general demurrer to the plea), that the crops were at the time of the bargain and sale an interest in the land, and within the statute of frauds; so that though the defendant had had the benefit of them, he was not obliged to pay for them on the terms of that bargain and sale, but on a quantum meruit only.

Indebitatus assumpsit count for work and labour done and materials used by plaintiff in and about preparing for tillage certain lands afterwards let by plaintiff to defendant at his request. *Plea* in substance like the last, and same point held *à fortiori*.

defendant thereafter next mentioned, had been and was lawfully possessed of and entitled to a certain farm, lands and premises, upon which said farm, lands and premises certain crops of corn and turnips of him the plaintiff, of great value, were then growing and being, and upon divers parts of which said farm, lands and premises, he the plaintiff had before then by his servants done, performed and bestowed certain work and labour, and used and expended certain materials in and about the preparing and making the same ready for tillage, of which said work and labour and materials he the plaintiff, at the time of the making of the said promise and undertaking of the defendant hereinafter next mentioned, had not derived the benefit, to wit, at &c., and thereupon heretofore, to wit, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the defendant, would let to him the said defendant the said farm, lands and premises, with the appurtenances, excepting and reserving as in that behalf agreed upon, for a certain term, to wit, the term of 14 years, from 29th September 1827, and upon certain terms in that behalf agreed upon, he the defendant undertook and then and there promised the plaintiff to take the said growing crops, and to pay and allow him, the plaintiff, for the same,

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Indebitatus assumpsit count on an account stated. *Plea*, that before the taking of the account there was a verbal agreement for the sale of certain crops growing on the plaintiff's land, and for work, labour, and materials done and used in preparing the land for tillage—that there was a treaty for the plaintiff's letting and the defendant's taking the land for 14 years, to which defendant assented—that the money so to be paid for the crops, &c. was that concerning which the account was stated—and that there was no agreement in writing, or any note thereof.

Replication, that before the account was stated defendant had mown the crops and taken them to his own use, and had had and received the amount of the work and labour and materials.

Rejoinder, traversing the cutting the crops and receipt of the amount of the work and labour &c. before the stating the account.

General demurrer—Held that the contract in the pleadings was within 29 Car. 2. c. 3., and not being in writing could not be recovered upon.

Where there are cross-demurrers to the declaration and to the pleas, the defendant's counsel begins and has the reply.

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and for the said work and labour and materials, according to a valuation thereof to be made by certain persons, to wit, a certain person to be appointed by and on behalf of the plaintiff, and a certain other person to be appointed by and on behalf of the defendant, to value the same: and the plaintiff further said, that he confiding &c., did afterwards let to the defendant the said farm, lands and premises, with the appurtenances, for the said term, and upon the terms aforesaid, excepting and reserving as in that behalf agreed upon, and did leave on the said premises the said crops so growing and being thereon as aforesaid, and that the said defendant did then and there take possession of the said farm, lands and premises, and of the said crops so then and there growing thereon as aforesaid, and that the defendant had and received the benefit of the said work and labour and materials, and had taken the said crops to his own use, to wit, at &c.: And the said plaintiff further said, that afterwards, to wit, on &c., the said growing crops, work, labour and materials were fairly valued by one *J. D.*, a person for that purpose duly appointed by and on the behalf of the said plaintiff, and one *W. P.*, a person for that purpose duly appointed by and on the part and behalf of the said defendant, at a certain sum of money, to wit, 147*l.* 13*s.* Of all which said several premises the said defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested to pay the said sum of 147*l.* 13*s.* to the said plaintiff.

The breach stated that that sum was not paid.

The second count, after repeating the first count as far as the valuation, and the notice to the defendant of the premises, proceeded thus:—And the said plaintiff further saith, that after such valuation had been so made, to wit, on &c., at &c., it was agreed by and between the plaintiff and the defendant that the said

crops, work and labour and materials, should be again valued by certain other persons, to wit, one *R. J.*, appointed to value the same by and on behalf of the plaintiff, and a certain other person, to wit, one *T. H.*, appointed to value the same by and on behalf of the defendant; and thereupon afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the like special instance and request of the defendant, had undertaken and faithfully promised the defendant to accept and receive from the defendant the amount at which the said crops, work, labour, and materials should be valued by the said *R. J.* and *T. H.*, instead of the said sum of 147*l.* 13*s.* at which the said crops, work, labour, and materials had been so valued as aforesaid, he the defendant undertook and then and there faithfully promised the plaintiff to pay and allow him for the said crops, work, labour and materials, according to such valuation so to be made as last mentioned: And the plaintiff in fact further saith, that afterwards, to wit, on &c., at &c., the said growing crops, work, labour and materials were valued by the said *R. J.* and *T. H.* at a certain sum of money, to wit, the sum of 170*l.* 3*s.* Of all which said several premises the said defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested to pay the said sum of 170*l.* 3*s.* to the said plaintiff.

Breach, non-payment of the 170*l.* 3*s.*

The third count was similar to the first count, as far as the averment of the agreement, which it stated as follows:—In consideration that the plaintiff, at the like instance and request of the defendant, would agree to let him, the defendant, the said farm, lands and premises, for a certain term of years, to wit, of 14 years, from 29th September 1827, and upon certain terms, excepting and reserving as in that behalf agreed upon, and would suffer and permit the said defendant to enter

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The fourth count was similar to the third, only that, like the second count, it stated a second valuation at 170% *31.*, with a breach by non-payment.

Seventh count. And whereas also the defendant afterwards, to wit, on &c., at &c., had become and was tenant to the plaintiff of a certain other farm, lands and premises, with the appurtenances, and in consideration thereof he the defendant then and there undertook and faithfully promised the plaintiff to manage, use and cultivate the said farm, lands and premises, with the appurtenances, during the said tenancy, in a good and husbandlike manner, and according to the custom of the country where the said farm, lands and premises are situate; and the plaintiff in fact saith, that the defendant was and continued tenant to the plaintiff of the said farm, lands and premises, with the appurtenances, for a long space of time, to wit, from the time of making his said last-mentioned promise and undertaking hitherto, to wit, at &c.: Yet the defendant not regarding &c., but contriving &c., did not nor would, during the continuance of the said tenancy as aforesaid, manage, use or cultivate the said farm, lands and premises, with the appurtenances, in a good and husbandlike manner, and according to the custom of the country where the same were so situate as aforesaid, but on the contrary thereof he the defendant, after the making of the said promise and undertaking, and during the continuancy of the said tenancy, to wit, on &c., and on divers other days and times between that day and the day of exhibiting this bill, to wit, in &c., managed, used and cultivated the said farm, lands and premises, in a bad, improper, and unhusbandlike manner, and contrary to the custom of the country where the said farm, lands and premises were so situate as aforesaid, and contrary to his said last-mentioned promise and undertaking, to wit, at &c.

Eighth count, *indebitatus assumpsit*, for crops of corn, wheat and turnips, of the said plaintiff before

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then bargained and sold (a) by the plaintiff to the defendant at his special instance and request, and by the defendant, under and by virtue of such bargain and sale, before then accepted, had and received, and mown, cut down, and taken to his own use, and for work and labour before then done, and for certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises afterwards let by the plaintiff to the defendant at his request, and of which said work and labour and materials the said defendant had the use and benefit, for which the defendant was to pay the plaintiff—for the use and occupation of certain lands and premises of the plaintiff by the defendant—for goods bargained and sold, and sold and delivered by the plaintiff to the defendant, at his request, and for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendant—for money lent—for money had and received, and on an account stated. Damages—500*l*.

Pleas—1st. General issue. 2d. To the first four counts *actio non*, because defendant says that the said several terms of 14 years each in the said first four counts of the declaration respectively mentioned, were certain terms of 14 years, which were to commence respectively from the 29th day of *September* 1827, and which was the 29th day of *September* next before the making of the said promises of the defendant in the said first four counts respectively mentioned: And the defendant further says, that the said crops in the said first four counts respectively mentioned, and the benefit of the said work, labour and materials in those counts respectively mentioned, were not, nor was any part thereof, agreed to be excepted or reserved, nor were

(a) *Slade's case*, 4 Co. 92 b.

they, nor was any part thereof, excepted or reserved out of the lettings in the first and second counts respectively mentioned, or out of the agreements to let in the third and fourth counts respectively mentioned: And the defendant further says, that no agreement in respect of or relating to the said causes of action in the first four counts respectively mentioned, or any or either of them, nor any memorandum or note thereof, wherein the said promises of the defendant in those counts mentioned, or any or either of them, were or was stated or shown, was in writing signed by the defendant, or any other person thereunto by him lawfully authorized. Verification.

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Third plea.—As to so much of the last count of the said declaration as relates to the said sum of 200*l.*, in which the plaintiff averred that the defendant was indebted to him, the plaintiff, for divers crops of corn, wheat, and turnips, bargained and sold by the plaintiff to the defendant, the defendant said that the said crops, at the time of the said bargain and sale, were growing in and upon, and were affixed to certain lands of and belonging to, and then in the possession of the plaintiff, to wit, in &c., and that while the crops were so growing in and upon and were so affixed to the said lands, and just before the supposed bargain and sale, to wit, on 14 *November* 1827, in &c., there was a treaty on foot between the plaintiff and defendant, by which it was proposed, amongst other things, that the plaintiff should let the said lands with the appurtenances, excepting all timber trees and saplings, tin, copper, lead, and all other materials, metals, clay, marl and stone, water and watercourses, and also liberty of hunting, shooting, and sporting in, upon, and over the said premises, and also liberty to take in any part of the said premises for the purpose of making roads or planting, or any other purpose, on making satisfaction to the defendant, his

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executors, administrators, and assigns: To hold the same from the 29th of *September* then last past, for a term of 14 years then next ensuing, and that the defendant should take the said lands with the appurtenances, excepting as aforesaid, for the said term, and should take therewith the said crops so growing thereupon and affixed thereto as aforesaid; and thereupon, to wit, on the said 14 *November*, in &c., and just before the said supposed bargain and sale, the plaintiff and the defendant assented to the terms of the said treaty, and thereupon in order to carry the terms of the said treaty into execution, the said supposed bargain and sale in the introductory part of this plea mentioned was verbally contracted by and between the plaintiff and the defendant, to wit, on the day and year last aforesaid, in the county aforesaid; and the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said contract of bargain and sale is shown or stated, was in writing signed by the defendant or any other person thereunto by him lawfully authorized. Verification.

Fourth plea.—As to so much of the last count of the said declaration as relates to the sum of 200*l.*, in which the plaintiff avers that the defendant was indebted to the plaintiff, as being due and payable by the defendant to the plaintiff in respect of certain work and labour before then done, and of certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises which were afterwards let by the plaintiff to the defendant at his request, and of which said work and labour the defendant had the use and benefit, and for which the defendant was to pay the plaintiff, the defendant says that he was to pay the plaintiff as afore-

said by virtue of a certain promise theretofore made by the defendant to the plaintiff: And the defendant further says, that just before the making of the said promise by the defendant, to wit, on 14 *November* 1827, in &c. aforesaid, there was a treaty on foot, (as in third plea, to the end.) Verification.

Fifth plea.—As to so much of the said last count as related to the said sum of 300*l.*, in which the plaintiff had averred that the defendant was indebted to him the plaintiff for money found to be due from the defendant to the plaintiff, on an account stated between them, the defendant said that the said account was stated by and between the said plaintiff and defendant, of and concerning certain monies which the said defendant, before the stating of the said account, to wit, on 14 *November* 1827, in &c. aforesaid, verbally agreed with the said plaintiff to pay to him, as hereinafter mentioned, for divers crops of corn, wheat, and turnips, which at the time of making the same agreement were growing on certain lands then of and belonging to and in the possession of the plaintiff, and for and in respect of certain work and labour before then due, and certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of the same lands, of which said work and labour and materials, the plaintiff, at the time of making the said agreement, had not received the benefit: And the defendant further said, that just before the making of the said agreement, to wit, on &c., there was a treaty on foot between the said plaintiff and the said defendant, by which it was proposed that the plaintiff should let the last-mentioned lands with the appurtenances to the defendant, with the like exceptions as those in the third plea in that behalf mentioned: To hold the same from the 29th day of *September* then last past for a term of 14 years then next ensuing, and that the de-

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defendant should take the said lands (except as aforesaid) for the said term, and should therewith take the said crops so growing thereupon as aforesaid, and have the use and benefit of the said work and labour and materials; and that thereupon, to wit, on the said 14 *November*, in the year aforesaid, in the county aforesaid, and just before the making of the said agreement, the said plaintiff and the said defendant assented to the terms of the said treaty, and thereupon, in order to carry the terms of the said treaty into execution, to wit, on the day and year last aforesaid, in consideration that the plaintiff would let the said lands with the appurtenances (except as aforesaid) to the defendant for the said term, and would permit the defendant to take the said crops so growing thereon to his own use, and to have the use and benefit of the said work and labour and materials during the said term, he the defendant verbally agreed with the plaintiff to pay the plaintiff certain monies for the said crops, and for the use and benefit of the said work and labour and materials; which said monies so agreed to be paid to the plaintiff by the defendant as aforesaid, were the same monies of and concerning which the said account, as in the said last count mentioned, was so stated as in that count is mentioned: And the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said agreement so set forth in this plea as aforesaid, or the said account in the said last count mentioned, or the said promises therein mentioned to pay the said sum of 200*l.* therein and in the introductory part of this plea mentioned is stated or shown, was in writing signed by the defendant, or any other person by him thereunto lawfully authorized. Verification.

Demurrer to seventh count, stating for causes that

the breach assigned in the said count was too general, and that the said count did not show what the custom of the country was, which the defendant was stated to have acted contrary to, or what the defendant had committed which was contrary to the custom of the country, nor in what particular the said defendant hath broken the said custom, and that the defendant was not sufficiently informed by the said seventh count as to the cause of action of which the plaintiff complained against him.

General issue.—Similiter.

General demurrer and joinder to second, third, and fourth pleas.

Replication to fifth plea, that the said plaintiff ought not to be barred &c., because he says, that before the stating of the said account in the said declaration mentioned, the said defendant had mown, cut down, and accepted and taken, to and for his own use, the said crops of corn, wheat, and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned, for and in respect of which the said defendant had verbally agreed to pay the said plaintiff the said monies, of and concerning which the said account was stated by and between the said plaintiff and the said defendant, as in the fifth plea mentioned. Verification.

Rejoinder to that replication, because admitting that he the defendant had mown, cut down, and accepted and taken, to and for his the said defendant's own use, the said crops of corn, wheat and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned; yet for rejoinder the defendant said, that he the defendant did not so mow, cut down, and accept and take the said crops of corn, wheat, and turnips, and take, have, and receive

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defendant should take the said lands (except as aforesaid) for the said term, and should therewith take the said crops so growing thereupon as aforesaid, and have the use and benefit of the said work and labour and materials; and that thereupon, to wit, on the said 14 *November*, in the year aforesaid, in the county aforesaid, and just before the making of the said agreement, the said plaintiff and the said defendant assented to the terms of the said treaty, and thereupon, in order to carry the terms of the said treaty into execution, to wit, on the day and year last aforesaid, in consideration that the plaintiff would let the said lands with the appurtenances (except as aforesaid) to the defendant for the said term, and would permit the defendant to take the said crops so growing thereon to his own use, and to have the use and benefit of the said work and labour and materials during the said term, he the defendant verbally agreed with the plaintiff to pay the plaintiff certain monies for the said crops, and for the use and benefit of the said work and labour and materials; which said monies so agreed to be paid to the plaintiff by the defendant as aforesaid, were the same monies of and concerning which the said account, as in the said last count mentioned, was so stated as in that count is mentioned: And the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said agreement so set forth in this plea as aforesaid, or the said account in the said last count mentioned, or the said promises therein mentioned to pay the said sum of 200*l.* therein and in the introductory part of this plea mentioned is stated or shown, was in writing signed by the defendant, or any other person by him thereunto lawfully authorized. Verification.

Demurrer to seventh count, stating for causes that

the breach assigned in the said count was too general, and that the said count did not show what the custom of the country was, which the defendant was stated to have acted contrary to, or what the defendant had committed which was contrary to the custom of the country, nor in what particular the said defendant hath broken the said custom, and that the defendant was not sufficiently informed by the said seventh count as to the cause of action of which the plaintiff complained against him.

General issue.—Similiter.

General demurrer and joinder to second, third, and fourth pleas.

Replication to fifth plea, that the said plaintiff ought not to be barred &c., because he says, that before the stating of the said account in the said declaration mentioned, the said defendant had mown, cut down, and accepted and taken, to and for his own use, the said crops of corn, wheat, and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned, for and in respect of which the said defendant had verbally agreed to pay the said plaintiff the said monies, of and concerning which the said account was stated by and between the said plaintiff and the said defendant, as in the fifth plea mentioned.

Verification.

Rejoinder to that replication, because admitting that he the defendant had mown, cut down, and accepted and taken, to and for his the said defendant's own use, the said crops of corn, wheat and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned; yet for rejoinder the defendant said, that he the defendant did not so mow, cut down, and accept and take the said crops of corn, wheat, and turnips, and take, have, and receive

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and for the said work and labour and materials, according to a valuation thereof to be made by certain persons, to wit, a certain person to be appointed by and on behalf of the plaintiff, and a certain other person to be appointed by and on behalf of the defendant, to value the same: and the plaintiff further said, that he confiding &c., did afterwards let to the defendant the said farm, lands and premises, with the appurtenances, for the said term, and upon the terms aforesaid, excepting and reserving as in that behalf agreed upon, and did leave on the said premises the said crops so growing and being thereon as aforesaid, and that the said defendant did then and there take possession of the said farm, lands and premises, and of the said crops so then and there growing thereon as aforesaid, and that the defendant had and received the benefit of the said work and labour and materials, and had taken the said crops to his own use, to wit, at &c.: And the said plaintiff further said, that afterwards, to wit, on &c., the said growing crops, work, labour and materials were fairly valued by one *J. D.*, a person for that purpose duly appointed by and on the behalf of the said plaintiff, and one *W. P.*, a person for that purpose duly appointed by and on the part and behalf of the said defendant, at a certain sum of money, to wit, 147*l.* 13*s.* Of all which said several premises the said defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested to pay the said sum of 147*l.* 13*s.* to the said plaintiff.

The breach stated that that sum was not paid.

The second count, after repeating the first count as far as the valuation, and the notice to the defendant of the premises, proceeded thus:—And the said plaintiff further saith, that after such valuation had been so made, to wit, on &c., at &c., it was agreed by and between the plaintiff and the defendant that the said

crops, work and labour and materials, should be again valued by certain other persons, to wit, one *R. J.*, appointed to value the same by and on behalf of the plaintiff, and a certain other person, to wit, one *T. H.*, appointed to value the same by and on behalf of the defendant; and thereupon afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the like special instance and request of the defendant, had undertaken and faithfully promised the defendant to accept and receive from the defendant the amount at which the said crops, work, labour, and materials should be valued by the said *R. J.* and *T. H.*, instead of the said sum of 147*l.* 13*s.* at which the said crops, work, labour, and materials had been so valued as aforesaid, he the defendant undertook and then and there faithfully promised the plaintiff to pay and allow him for the said crops, work, labour and materials, according to such valuation so to be made as last mentioned: And the plaintiff in fact further saith, that afterwards, to wit, on &c., at &c., the said growing crops, work, labour and materials were valued by the said *R. J.* and *T. H.* at a certain sum of money, to wit, the sum of 170*l.* 3*s.* Of all which said several premises the said defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested to pay the said sum of 170*l.* 3*s.* to the said plaintiff.

Breach, non-payment of the 170*l.* 3*s.*

The third count was similar to the first count, as far as the averment of the agreement, which it stated as follows:—In consideration that the plaintiff, at the like instance and request of the defendant, would agree to let him, the defendant, the said farm, lands and premises, for a certain term of years, to wit, of 14 years, from 29th September 1827, and upon certain terms, excepting and reserving as in that behalf agreed upon, and would suffer and permit the said defendant to enter

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upon and take possession of the said farm, lands and premises, and to take and have the said growing crops to his own use and benefit, and to have and enjoy the benefit of the work and labour and materials, he the defendant undertook and then and there promised the plaintiff to take the said growing crops, and to pay and allow him the said plaintiff for the same, and for the work and labour and materials, according to the valuation thereof to be made by certain persons &c.; and the plaintiff averred that he confiding &c. did afterwards, to wit, on &c. at &c. agree to let the defendant the said farm, lands and premises, with the appurtenances, for the said term of years, and upon the same terms, excepting and reserving as in that behalf agreed upon, and did leave on the said premises the said crops growing and being thereon as aforesaid, and did suffer and permit the said defendant to enter upon and take possession of the said farm, lands and premises, and to take and have the said growing crops to and for his own use and benefit, and to have and enjoy the benefit of the said work and labour and materials, and that the defendant did then and there enter upon and take possession of the said farm, lands and premises, and take and have the said growing crops to and for his own use and benefit, and have and enjoy the benefit of the said work and labour and materials, to wit, at &c.: And the plaintiff further averred, that afterwards, to wit, on &c., at &c., the said growing crops, work and materials, were fairly valued by one *J. D. &c.*, and one *W. P. &c.*, at a certain sum of money, to wit, 147*l.* 13*s.* Of all which premises the defendant had notice, and was requested &c.

Breach as in first count.

The fourth count was similar to the third, only that, like the second count, it stated a second valuation at 170*l.* 3*s.*, with a breach by non-payment.

Seventh count. And whereas also the defendant afterwards, to wit, on &c., at &c., had become and was tenant to the plaintiff of a certain other farm, lands and premises, with the appurtenances, and in consideration thereof he the defendant then and there undertook and faithfully promised the plaintiff to manage, use and cultivate the said farm, lands and premises, with the appurtenances, during the said tenancy, in a good and husbandlike manner, and according to the custom of the country where the said farm, lands and premises are situate; and the plaintiff in fact saith, that the defendant was and continued tenant to the plaintiff of the said farm, lands and premises, with the appurtenances, for a long space of time, to wit, from the time of making his said last-mentioned promise and undertaking hitherto, to wit, at &c.: Yet the defendant not regarding &c., but contriving &c., did not nor would, during the continuance of the said tenancy as aforesaid, manage, use or cultivate the said farm, lands and premises, with the appurtenances, in a good and husbandlike manner, and according to the custom of the country where the same were so situate as aforesaid, but on the contrary thereof he the defendant, after the making of the said promise and undertaking, and during the continuancy of the said tenancy, to wit, on &c., and on divers other days and times between that day and the day of exhibiting this bill, to wit, in &c., managed, used and cultivated the said farm, lands and premises, in a bad, improper, and unhusbandlike manner, and contrary to the custom of the country where the said farm, lands and premises were so situate as aforesaid, and contrary to his said last-mentioned promise and undertaking, to wit, at &c.

Eighth count, *indebitatus assumpsit*, for crops of corn, wheat and turnips, of the said plaintiff before

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then bargained and sold (a) by the plaintiff to the defendant at his special instance and request, and by the defendant, under and by virtue of such bargain and sale, before then accepted, had and received, and mown, cut down, and taken to his own use, and for work and labour before then done, and for certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises afterwards let by the plaintiff to the defendant at his request, and of which said work and labour and materials the said defendant had the use and benefit, for which the defendant was to pay the plaintiff—for the use and occupation of certain lands and premises of the plaintiff by the defendant—for goods bargained and sold, and sold and delivered by the plaintiff to the defendant, at his request, and for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendant—for money lent—for money had and received, and on an account stated. Damages. 500*l*.

Pleas—1st. General issue. 2d. To the first four counts *actio non*, because defendant says that the said several terms of 14 years each in the said first four counts of the declaration respectively mentioned, were certain terms of 14 years, which were to commence respectively from the 29th day of *September* 1827, and which was the 29th day of *September* next before the making of the said promises of the defendant in the said first four counts respectively mentioned: And the defendant further says, that the said crops in the said first four counts respectively mentioned, and the benefit of the said work, labour and materials in those counts respectively mentioned, were not, nor was any part thereof, agreed to be excepted or reserved, nor were

(a) *Slade's case*, 4 Co. 92 b.

they, nor was any part thereof, excepted or reserved out of the lettings in the first and second counts respectively mentioned, or out of the agreements to let in the third and fourth counts respectively mentioned: And the defendant further says, that no agreement in respect of or relating to the said causes of action in the first four counts respectively mentioned, or any or either of them, nor any memorandum or note thereof, wherein the said promises of the defendant in those counts mentioned, or any or either of them, were or was stated or shown, was in writing signed by the defendant, or any other person thereunto by him lawfully authorized. Verification.

Third plea.—As to so much of the last count of the said declaration as relates to the said sum of £200^l., in which the plaintiff averred that the defendant was indebted to him, the plaintiff, for divers crops of corn, wheat, and turnips, bargained and sold by the plaintiff to the defendant, the defendant said that the said crops, at the time of the said bargain and sale, were growing in and upon, and were affixed to certain lands of and belonging to, and then in the possession of the plaintiff, to wit, in &c., and that while the crops were so growing in and upon and were so affixed to the said lands, and just before the supposed bargain and sale, to wit, on 14 November 1827, in &c., there was a treaty on foot between the plaintiff and defendant, by which it was proposed, amongst other things, that the plaintiff should let the said lands with the appurtenances, excepting all timber trees and saplings, tin, copper, lead, and all other materials, metals, clay, marl and stone, water and watercourses, and also liberty of hunting, shooting, and sporting in, upon, and over the said premises, and also liberty to take in any part of the said premises for the purpose of making roads or planting, or any other purpose, on making satisfaction to the defendant, his

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executors, administrators, and assigns: To hold the same from the 29th of *September* then last past, for a term of 14 years then next ensuing, and that the defendant should take the said lands with the appurtenances, excepting as aforesaid, for the said term, and should take therewith the said crops so growing thereupon and affixed thereto as aforesaid; and thereupon, to wit, on the said 14 *November*, in &c., and just before the said supposed bargain and sale, the plaintiff and the defendant assented to the terms of the said treaty, and thereupon in order to carry the terms of the said treaty into execution, the said supposed bargain and sale in the introductory part of this plea mentioned was verbally contracted by and between the plaintiff and the defendant, to wit, on the day and year last aforesaid, in the county aforesaid; and the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said contract of bargain and sale is shown or stated, was in writing signed by the defendant or any other person thereunto by him lawfully authorized. Verification.

Fourth plea.—As to so much of the last count of the said declaration as relates to the sum of 200*l.*, in which the plaintiff avers that the defendant was indebted to the plaintiff, as being due and payable by the defendant to the plaintiff in respect of certain work and labour before then done, and of certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises which were afterwards let by the plaintiff to the defendant at his request, and of which said work and labour the defendant had the use and benefit, and for which the defendant was to pay the plaintiff, the defendant says that he was to pay the plaintiff as afore-

said by virtue of a certain promise theretofore made by the defendant to the plaintiff: And the defendant further says, that just before the making of the said promise by the defendant, to wit, on 14 *November* 1827, in &c. aforesaid, there was a treaty on foot, (as in third plea, to the end.) Verification.

Fifth plea.—As to so much of the said last count as related to the said sum of 200*l.*, in which the plaintiff had averred that the defendant was indebted to him the plaintiff for money found to be due from the defendant to the plaintiff, on an account stated between them, the defendant said that the said account was stated by and between the said plaintiff and defendant, of and concerning certain monies which the said defendant, before the stating of the said account, to wit, on 14 *November* 1827, in &c. aforesaid, verbally agreed with the said plaintiff to pay to him, as hereinafter mentioned, for divers crops of corn, wheat, and turnips, which at the time of making the same agreement were growing on certain lands then of and belonging to and in the possession of the plaintiff, and for and in respect of certain work and labour before then due, and certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of the same lands, of which said work and labour and materials, the plaintiff, at the time of making the said agreement, had not received the benefit: And the defendant further said, that just before the making of the said agreement, to wit, on &c., there was a treaty on foot between the said plaintiff and the said defendant, by which it was proposed that the plaintiff should let the last-mentioned lands with the appurtenances to the defendant, with the like exceptions as those in the third plea in that behalf mentioned: To hold the same from the 29th day of *September* then last past for a term of 14 years then next ensuing, and that the de-

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executors, administrators, and assigns: To hold the same from the 29th of *September* then last past, for a term of 14 years then next ensuing, and that the defendant should take the said lands with the appurtenances, excepting as aforesaid, for the said term, and should take therewith the said crops so growing thereupon and affixed thereto as aforesaid; and thereupon, to wit, on the said 14 *November*, in &c., and just before the said supposed bargain and sale, the plaintiff and the defendant assented to the terms of the said treaty, and thereupon in order to carry the terms of the said treaty into execution, the said supposed bargain and sale in the introductory part of this plea mentioned was verbally contracted by and between the plaintiff and the defendant, to wit, on the day and year last aforesaid, in the county aforesaid; and the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said contract of bargain and sale is shown or stated, was in writing signed by the defendant or any other person thereunto by him lawfully authorized. Verification.

Fourth plea.—As to so much of the last count of the said declaration as relates to the sum of 200*l.*, in which the plaintiff avers that the defendant was indebted to the plaintiff, as being due and payable by the defendant to the plaintiff in respect of certain work and labour before then done, and of certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises which were afterwards let by the plaintiff to the defendant at his request, and of which said work and labour the defendant had the use and benefit, and for which the defendant was to pay the plaintiff, the defendant says that he was to pay the plaintiff as afore-

said by virtue of a certain promise theretofore made by the defendant to the plaintiff: And the defendant further says, that just before the making of the said promise by the defendant, to wit, on 14 *November* 1827, in &c. aforesaid, there was a treaty on foot, (as in third plea, to the end.) Verification.

Fifth plea.—As to so much of the said last count as related to the said sum of 300*l.*, in which the plaintiff had averred that the defendant was indebted to him the plaintiff for money found to be due from the defendant to the plaintiff, on an account stated between them, the defendant said that the said account was stated by and between the said plaintiff and defendant, of and concerning certain monies which the said defendant, before the stating of the said account, to wit, on 14 *November* 1827, in &c. aforesaid, verbally agreed with the said plaintiff to pay to him, as hereinafter mentioned, for divers crops of corn, wheat, and turnips, which at the time of making the same agreement were growing on certain lands then of and belonging to and in the possession of the plaintiff, and for and in respect of certain work and labour before then due, and certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of the same lands, of which said work and labour and materials, the plaintiff, at the time of making the said agreement, had not received the benefit: And the defendant further said, that just before the making of the said agreement, to wit, on &c., there was a treaty on foot between the said plaintiff and the said defendant, by which it was proposed that the plaintiff should let the last-mentioned lands with the appurtenances to the defendant, with the like exceptions as those in the third plea in that behalf mentioned: To hold the same from the 29th day of *September* then last past for a term of 14 years then next ensuing, and that the de-

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defendant should take the said lands (except as aforesaid) for the said term, and should therewith take the said crops so growing thereupon as aforesaid, and have the use and benefit of the said work and labour and materials; and that thereupon, to wit, on the said 14 *November*, in the year aforesaid, in the county aforesaid, and just before the making of the said agreement, the said plaintiff and the said defendant assented to the terms of the said treaty, and thereupon, in order to carry the terms of the said treaty into execution, to wit, on the day and year last aforesaid, in consideration that the plaintiff would let the said lands with the appurtenances (except as aforesaid) to the defendant for the said term, and would permit the defendant to take the said crops so growing thereon to his own use, and to have the use and benefit of the said work and labour and materials during the said term, he the defendant verbally agreed with the plaintiff to pay the plaintiff certain monies for the said crops, and for the use and benefit of the said work and labour and materials; which said monies so agreed to be paid to the plaintiff by the defendant as aforesaid, were the same monies of and concerning which the said account, as in the said last count mentioned, was so stated as in that count is mentioned: And the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of this plea mentioned, nor any memorandum or note thereof, wherein the said agreement so set forth in this plea as aforesaid, or the said account in the said last count mentioned, or the said promises therein mentioned to pay the said sum of 200*l.* therein and in the introductory part of this plea mentioned is stated or shown, was in writing signed by the defendant, or any other person by him thereunto lawfully authorized. Verification.

Demurrer to seventh count, stating for causes that

the breach assigned in the said count was too general, and that the said count did not show what the custom of the country was, which the defendant was stated to have acted contrary to, or what the defendant had committed which was contrary to the custom of the country, nor in what particular the said defendant hath broken the said custom, and that the defendant was not sufficiently informed by the said seventh count as to the cause of action of which the plaintiff complained against him.

General issue.—Similiter.

General demurrer and joinder to second, third, and fourth pleas.

Replication to fifth plea, that the said plaintiff ought not to be barred &c., because he says, that before the stating of the said account in the said declaration mentioned, the said defendant had mown, cut down, and accepted and taken, to and for his own use, the said crops of corn, wheat, and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned, for and in respect of which the said defendant had verbally agreed to pay the said plaintiff the said monies, of and concerning which the said account was stated by and between the said plaintiff and the said defendant, as in the fifth plea mentioned. Verification.

Rejoinder to that replication, because admitting that he the defendant had mown, cut down, and accepted and taken, to and for his the said defendant's own use, the said crops of corn, wheat and turnips in the said fifth plea mentioned, and had taken, had and received the amount of the said work and labour and materials in the same plea mentioned; yet for rejoinder the defendant said, that he the defendant did not so mow, cut down, and accept and take the said crops of corn, wheat, and turnips, and take, have, and receive

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the amount of the said work and labour and materials, before the stating of the said account in the said declaration mentioned, in manner and form as the plaintiff hath in his said replication above in that behalf alleged.

General demurrer and joinder.

Addison for the defendant. First, in support of the demurrer to the seventh count, the breach there assigned is too general. Though it will be said that it is in all cases sufficient if a breach is assigned in the words of the covenant or promise, that is not true as a general proposition. It may be true where the denial of one or two specific facts is sufficient to bring the point in dispute before the Court, but not where the promise is so general and embraces so much matter that the actual fact complained of is not disclosed by the breach. In *Warn v. Bickford* (a), the demurrer was to the plea; but as the breach was held bad, that decision has the same weight as if the declaration had been demurred to generally. The breach was there assigned in the words of the covenant, which was to cultivate according to the custom of the country; but it was held not sufficient so to assign it. A general count of this nature has been frequently adopted to follow special counts, and may be good after verdict. *Comyns' Digest*, tit. *Pleader* (C 22) is, "In debt on a contract to pay 20s. on waste done, an allegation by plaintiff that the defendant committed waste, is not sufficient without showing how the waste was done." The same book and title (C 48) cites *Knight v. Keith* (b) to show that a breach *non performavit agreementum*, without saying in what particular, is bad (c). Now this breach is no other. [*Bayley B.* It does not point

(a) 7 Pri. 550. See 9 Pri. 43.

(b) *Skinner*, 344.

(c) *Secus* where there are mutual agreements and promises, 3 Lev. 319; 4 Mod. 188; Com. Dig. tit. *Pleader* (C 45);

out as to what part of the farm or in what respect the complaint is made.]

Next, in support of the pleas to the four first counts, the demurrer admits the truth of the averment in those pleas, that the growing crops and the benefit of the work and materials were not excepted in writing from the lettings or agreements to let. Then the agreement sued on being verbal for letting a farm, and for taking certain crops and labour bestowed thereon, cannot be enforced by action since the statute of frauds 29 *Car. 2. c. 3. s. 4.* In *Mayfield v. Wadsley* (a), *Littledale J.* was of opinion that where land was to be given up by the plaintiff to a lessee, and the crops thereon were to be taken at a price named, they passed to him as part of the land, and the judgment of the court proceeded on the ground that distinct contracts existed for the crops and dead stock, at separate prices for each, so as to take the case out of the rule, that a contract void in part must be void *in toto*; recognized in *Thomas v. Williams* (b).

[*Bayley B.* There the promise was stated to be entire (c).] Here it is admitted that the plaintiff did demise, and the valuation of the crops and labour was in pursuance of the original contract to let and take the farm; so the promise is entire. In *Chater v. Beckett* (d), the defendant promised verbally to do two things, one good within the statute, the other not, and did the former only. The action was for non-performance of that part of the defendant's promise which was to do a thing not within the statute; but it was held that the entirety of the contract prevented the plaintiff from recovering. [*Bayley B.* In that case the special count stated the promise as entire, *viz.* to take certain bills in payment of a debt, and also to pay expenses

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(a) 3 B. & C. 363.

(b) 10 B. & C. 664.

(c) See further observations by *Bayley B.* on this case in *Wood v. Benson*, Vol. II. 97, 99.

(d) 7 T. R. 201.

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incurred by the plaintiff. The latter part being void by the statute, the whole promise was avoided at law.] That promise could not be stated otherwise, for the plaintiff could not split the contract, *Neale v. Viney* (a). Besides, upon these pleadings it is admitted that the crops, and benefit of the labour bestowed on the land, were never excepted in writing out of the demise; they therefore passed to the defendant, and belonged to him of right under the agreement for that purpose. Then an express promise to pay the amount at which they might be estimated by subsequent valuation would have been *nudum pactum*, and no implied promise to that effect can arise from the defendant's having submitted to allow such a valuation to take place.

As to the general count, the same question is raised on the pleas, which identify the subject-matter of the contracts there stated with that in the special counts, and show that the crops &c. were growing on and made one with the land. They also show that the account was stated about the same matter. The agreement for the land being thus mixed up with the contract to pay for the crops, &c., could only be declared on as entire, and therefore specially. *Neale v. Viney* supports that position. There an agreement had been made to assign a lease to the defendant, he being to take the fixtures and crops at a valuation: he was let into possession and had the crops, &c., but the lease was never assigned to him for want of title. It was held that he could not be sued in *indebitatus assumpsit* for the valued price of the fixtures and crops, as on a distinct contract for them.

Follett for the plaintiff. The breach in the seventh count is sufficient, being alleged in the words of the promise, and no question of law being involved in

(a) 1 Campb. 471.

it. (a) [*Bayley* B. In suing on a bond conditioned for the performance of covenants, distinct breaches of them would be assigned.] The covenants in that case are themselves distinct; but in a case like this, the landlord, who may reside at a distance, may find at the end of the term that his farm is in bad condition, and may undertake by this breach to prove by testimony of witnesses, as a matter of fact, that his farm, as a whole, has not been cultivated in a husband-like manner according to the custom of the country. He must deduce that conclusion from its general state, and not from the breach of any particular covenant, *e. g.* to fallow at proper times, as he might have done on a lease or such a bond as is alluded to. The specific means by which the injury has been caused are peculiarly known to the tenant, but the landlord may well be ignorant whether the damage arose from want of manure or by improper cropping. Nor do the precedents encourage particularity in breaches of this kind, for in *Harris v. Mantle* (b) a breach in covenant having first assigned "that the defendant had not used a farm in a husbandlike manner," went on to state, "but, on the contrary, committed waste," it was held, that though on the former words of the breach the evidence would have been admissible, yet, that as the plaintiff had afterwards narrowed it to *waste*, he could not give evidence of unhusbandlike treatment, which did not amount to waste. [Lord *Lyndhurst* C. B. *Lutwyche*, 329, is an authority that a breach in the words of a covenant for not repairing will suffice, without enumerating the particular dilapidations.] Nor is *Knight v. Keith* contrary; for that breach, that the defendant "did not perform his agreement," might involve a question of law, and the dictum


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(a) Com. Dig. tit. Pleader, (C 45); and see id. 46, 49; 2 V. 2; 9 Co. 60, b; 2 Saund. 181 b; 1 Pri. 109; 6 Taunt. 45, *semb. contrâ*.

(b) 3 T. R. 307; see id. 637, and 1 Chitty on Pleading, 4 edit. 290.

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appears *obiter* only. The breach in *Warn v. Bickford* is peculiar, the covenant was to do an act on reasonable request, then the breach did not arise till the defendant was required to do that act; but it did not appear that he was so required. [Lord *Lyndhurst* C. B. When the cautious terms of that judgment are considered, it almost amounts to an authority in favour of the plaintiff on the general rule.] No authority is cited by *Comyns* for the position cited from his *Digest* tit. *Pleader* (C. 22,) and the issue waste or not was a question of law (a). Where that is so, facts should have been alleged which might be found by a jury so as to raise the question of law. That was not so necessary here, the promise being to cultivate according to the custom of the country, which involves no such question. [*Bayley* B. The particular parts of the farm which may have been injured, *e. g.* by cross cropping, &c. are not pointed out by the breach.] In none of the cases cited on covenants has that been deemed necessary. They show that on a covenant to repair a house, the breach may be assigned that he did not do so, without pointing out the particular matter complained of.

The question raised by the demurrers to the other pleadings are substantially the same. It has been argued that the crops formed part of the land demised, and not being excepted out of the agreement for demise, would not form a subject-matter of separate contract. The difference between the counts is material; for the first and third show that the defendant, after the agreement, made, entered and reaped the benefit of the crops, after which the action is brought to recover the value of the crops taken, and of the labour which the defendant has had the benefit of. Now the consideration is the agreement to let to the defendant,

(a) See *Harris v. Mantle*, 6 T. R. 307.

and his promise is not to take the land, but to take and pay for the growing crops.

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The question is, can that promise be enforced on these pleadings? First, as no demise of the land took place, no writing was necessary under the statute of frauds. Secondly, the plaintiff is entitled to judgment on the account stated, as it is admitted that the defendant has entered and taken possession of the crops. On the first point, it is to be observed, that the old doctrine of growing crops being an interest in land, has been gradually narrowed. Thus in *Evans v. Roberts* (a) crops of potatoes, and in *Smith v. Surman* (b) growing trees, were held not to be such interest in land as were within the statute. [Bayley B. In *Smith v. Surman* the seller was to cut the timber, he therefore was to make the subject-matter of the contract a chattel; but before that was done, by cutting down the trees, the vendee had no interest in them. Bolland B. Is not the contract for letting the land and sale of the crops so mixed together, that, whether the latter were sold as a matter of specific sale or not, we cannot sever it? The sale of the crops might involve the question, Whether they were to be fed on the farm.] That contract does not appear on these pleadings. [Lord Lyndhurst C. B. Will it not arise? The contract is substantially, to let a farm for fourteen years, in its actual and benefitted condition; viz. in other language, in consideration that the plaintiff will let land in its actual state with the crops &c. on it, the defendant promises to pay him so much money as the valuers fix. Is not that contract entire, and for an interest in land?] I say, that that part of the contract for the crops is not. It is clear that the outgoing tenant might, while in possession, have made such a

(a) 5 B. & Cr. 829. See Vol. II. 429, as to this case.

(b) 9 B. & Cr. 361. See *id.*

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contract as this respecting the crops, distinct from letting the land, and might have refused to give possession till the crops were bought. Then why may not the landlord while in possession do the same thing? *Thomas v. Williams* (a) was cited to show that where the statute of frauds requires a contract to be in writing as to part, then if it is void as to part for being verbal only, it is void *in toto*. Now that was a case of two claims; the promise was laid in consideration of forbearance by the plaintiff to distrain on a third person to pay two sums, one for rent due by him, and the other for rent to become due; and the question was, whether the plaintiff, who produced no written contract, had within the statute of frauds proved the whole of that promise so laid as entire? and it was held that he had not. In *Wood v. Benson* (b) the case of *Thomas v. Williams* was reviewed, and Lord *Lyndhurst* approved that decision, on the ground that the declaration having there stated the entire contract, including the part void by the statute of frauds, the contract stated was not proved. Now this defendant is not charged with any default to take the land, but with the single act of not paying for the crops; and the plaintiff alleges no promise within the statute of frauds. [Lord *Lyndhurst* C. B. If the crops could be separated from the land, how can the work and labour which has been expended on it be severed from it? *Bayley* B. Labour is not an interest in land, but when bestowed on it becomes part of it, by altering its condition.] Were the plaintiff an outgoing tenant without interest in the land, the benefit of labour so bestowed, and incorporated with land would be the subject of a contract not within the statute of frauds, as appears by Mr. Justice *Littledale's* judgment in *Evans v. Roberts* (c). Then I put this contract to pay for the

(a) 10 B. & Cr. 564.

(b) Vol. II. 93.

(c) 5 B. & Cr. 839.

labour bestowed as distinct from any interest in the land let. [Lord *Lyndhurst* C. B. The bargain for crops and labour between an outgoing and incoming tenant is necessarily separate from that for the land, and rests in contract; here the landlord's interest intervenes.] I rest the argument on the ground that a contract to pay for crops and labour may be made distinctly from any interest in the land. Suppose the parties had contracted for this farm in another shape, and had then made a distinct contract for the price of the labour bestowed on it, that would not be a contract for an interest in land, unless it were for the possession of land (a). [Lord *Lyndhurst* C. B. It is averred in the second plea that the crops and labour &c. were not excepted out of the agreements to let the land, stated in the third and fourth counts. Then, as the letting land for fourteen years in its then actual condition, was the consideration of the promises, the crops &c., not being excepted, were let; but the third and fourth pleas show that the agreement for the bargain and sale of the crops and for the value of the labour was verbal.]

Supposing that part of this contract ought to have been in writing under the statute of frauds, still after the condition has been executed, as the defendant has had the crops and labour, and the benefit of the contract, the plaintiff may recover on the indebitatus assumpsit count for crops "bargained and sold, had and taken," and on the account stated, *Knowles v. Michel* (b), *Crosby v. Wadsworth* (c), *Poulter v. Killingbeck* (d). In *Teal v. Auty* (e), where it was admitted that a contract for sale of growing poles should have been in writing, yet as the poles had been taken away and the agreement executed, the court said that

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(a) See 6 East, 609.


(b) 13 East, 249; 12 East, 1.

(c) 6 East, 610.

(d) 1 B. & P. 397.

(e) 2 Brod. & B. 99.

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could the plaintiff have proved the amount due to him by other evidence, there might have been no necessity for referring to the original agreement.

Addison in reply. The rejoinder is admitted to be true, and is an answer to the plaintiff's claim on the count for an account stated, by showing that that account must have been stated with reference to the original bargain, and to no contract implied from the possession of the crops by the defendant at a subsequent time.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

LORD LYNBHURST C. B.—The plaintiff in this case insists upon three demands against the defendant, one for growing crops, one for work, labour and materials, and the third for the mismanagement of a farm; and the questions are, whether he is not prevented by the statute of frauds from recovering from the first and second of these claims; and whether the breach upon the third is not laid too generally. The first count of the declaration states, that he was possessed of a farm upon which were certain crops of corn and turnips, and on which he had done certain work and labour, and expended certain materials in making it ready for tillage, of which work, labour and materials he had not derived the benefit; and thereupon in consideration that the plaintiff would let him the farm for fourteen years, the defendant undertook to take the crops and pay for them, and for the work, labour and materials according to a valuation. It is then averred that the plaintiff let the farm accordingly, and left the crops upon it, and the defendant took possession of the farm and crops, and had the benefit of the work, labour and

materials. The second count is nearly similar. In the third and fourth counts it is stated that in consideration that the plaintiff would agree to let the farm to the defendant for a term of fourteen years, and would suffer him to enter and take the crops to his own use and have the benefit of the work, labour and materials, the defendant undertook to take the crops, and allow the plaintiff for the same, and for the work, labour and materials, according to a valuation. It is then averred that the plaintiff did agree to let the farm for the said term, and did leave the crops upon the said premises, and suffered the defendant to enter and have the crops, and the benefit of the work, labour and materials; and that the defendant did enter and take the crops, and had the benefit of the work, labour and materials.

To these four counts, defendant has pleaded that the crops and benefit of the work, labour and materials were not excepted or reserved out of the lettings or agreements to let, and that there was no agreement in writing in respect of the causes of action in those counts mentioned or any memorandum or note thereof. The effect of these pleadings is to raise the objection of the statute of frauds to the plaintiff's claim to recover on the four first counts of the declaration. By the fourth section of 29 *Car.2. c. 3.* no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing. The question then is, whether these counts are founded upon a contract for an interest in lands. At the time when each of these contracts upon which the plaintiff sues is stated to have been made, the crops were growing upon the land, the defendant was to have the land as well as the crops, and the work, labour and materials were so incorporated with the land as to be

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inseparable from it. The defendant would not have the benefit of the work, labour and materials, unless he had the land, and we are of opinion that the right to the crops and the benefit of the work, labour and materials, were both of them an interest in the land, but if either of the two were properly an interest in land this would form a sufficient objection to the special counts; for the crops and work and labour united are the consideration in each count, and if either part of the consideration fails, the plaintiff cannot be entitled to recover.

The next claim in the declaration is contained in the indebitatus count, which states that the defendant was indebted in 200*l.* for crops bargained and sold, and by the defendant, under and by virtue of that bargain and sale, before then accepted, had and received, and cut down and taken to his own use. To this the defendant has pleaded, that the crops at the time of the bargain and sale were growing upon and affixed to certain lands of the plaintiff then in his possession, and that just before the bargain and sale there was a treaty on foot between the plaintiff and defendant, by which it was proposed that the plaintiff should let the lands to the defendant for fourteen years, and should take therewith the said crops; and the defendant assented to that treaty; and thereupon in order to carry the treaty into execution the said supposed bargain and sale was verbally contracted between the plaintiff and defendant, and that there was no agreement in writing of the said cause of action, or any memorandum or note thereof. To this plea the plaintiff has demurred, and he insists that inasmuch as it is alleged and admitted that the defendant had these crops, he is liable to pay for them, and the statute of frauds is no bar, and he relies on *Teal v. Auty and another* (a), for

(a) 2 Bro. & Bing. 99.

that position. But admitting that the defendant is to pay for the crops, he ought to pay for them, not upon the terms and footing of that bargain and sale, but upon a quantum meruit. The crops at the time of the bargain and sale were, upon these pleadings, an interest in the land; and to allow the plaintiff to recover upon this bargain and sale, and to have the price regulated by it, would be in direct opposition to the statute, because it would be giving effect to an action upon a verbal contract for an interest in lands.

The next claim is for the work and labour and materials, to which there is in substance a similar plea; and if the claim as to the crops cannot be supported, it follows, *à fortiori*, that this also must fail. Upon the pleadings it was a contract for that which was at the time of such contract an interest in the land, and for that which never was and never could be separated from it.

The last claim in respect of the crops, and of the work and labour and materials, is upon the account stated, and the defendant states, that before the taking of the account there was a verbal agreement for the crops which were growing on the plaintiff's land, and for the work and labour and materials in preparing part of the plaintiff's ground for tillage: that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for the crops, and the work, labour and materials, was the money concerning which the account was stated, and that there was no agreement in writing of and concerning the said cause of action, or any memorandum or note thereof. To this plea the plaintiff has replied, that before the account was stated the defendant had mown the crops, and taken them to his own use, and had had and received the amount of the work and

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labour and materials; and the defendant, though he admits he cut down the crops, &c., and received the amount of the work and labour, insists that he did not cut down the crops or have the amount of the work and labour until after stating of the account.

The plaintiff's object, therefore, upon the account stated, is to take the case out of the operation of the statute of frauds, and charge the defendant upon a new contract; a contract which the law would imply from the defendant's taking the crops and receiving the benefit of the work, labour and materials; and this object the defendant has defeated by showing that the account was stated when the case stood wholly upon the original contract, and before the mowing of the crops, which was to raise a new contract, had occurred. The only objection, therefore, upon the statute of frauds, applies to the count upon the account stated, as well as to the other counts.

The only remaining question is upon the seventh count of the declaration, and the objection to that count is, that it is too general.

That count is founded upon a promise, in consideration of defendant's being tenant to plaintiff of a certain farm, to manage it in a good and husband-like manner, and according to the custom of the country where the farm was. The breach was, that he did not so manage it, but on the contrary managed it in a bad and un-husband-like manner, and contrary to the custom of the country where the farm was.

The defendant has demurred specially, on the grounds that the breach is too general; that the count does not show what the custom of the country is, or what the defendant has committed contrary to the custom of the country, nor in what he has broken the custom; and that the defendant is not sufficiently informed by that count of the cause of action of which plaintiff complains

against him. The count is certainly general, and it might be safer for plaintiff to amend, than to hazard the opinion of a court of error.

Judgment accordingly.

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PERKINS *against* BENTON (a).

COMYN for the sheriff of *Surrey* had obtained the usual rule for staying proceedings under 1 & 2 *Wm.* 4. c. 58. s. 6. and calling on the plaintiff in the action, and *Augustus Moore*, the claimant of the goods taken in execution by the plaintiff, to appear before the Court and abide its order thereon. On moving to make it absolute, the claimant *Moore* did not appear.

When a sheriff had taken goods in execution, and on an adverse claim being made to them obtained a rule under 1 & 2 *Wm.* 4. c. 58. s. 6. to which the claimant did not appear, the Court barred the claim, and ordered him to pay the execution creditor his costs of showing cause against the rule, unless cause was shown in six days from service of such order.

Mansel for the plaintiff, as judgment creditor, moved to insert a term in the rule that the claimant should be ordered to pay costs to his client for not having appeared to the sheriff's rule, *Bowdler v. Smith* (b).

BAYLEY B.—The doubt is, whether the claimant should be made to pay the costs, he not being in a condition to be heard. Now it is to be observed, that sect. 3, to which sect. 6 refers, speaks of three persons, a third party and the plaintiff and defendant; and only gives power to make "reasonable orders" as to costs between the plaintiff and defendant, and not to give costs to the plaintiff to be paid by the third party. Nor does this rule call on him to show cause why he should not pay costs if he does not appear.

VAUGHAN B.—The 1st and 3d sections are *diverso*

(a) This case occurred in *Trinity Term*, 1833. (b) *Dowl. Pr. C.* 417.

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intuitu from sect. 6, which applies to this motion by a *sheriff*; but here the plaintiff as judgment creditor having been brought into court on a claim not substantiated by the claimant's appearance here, is entitled to some relief.

The Court pronounced a rule, that the claim of *Moore* should be barred, and that he should pay the execution creditor his costs of showing cause against the rule, unless cause should be shown against the payment of such costs only, within six days from the service of such rule and order.

Rule *nisi* making itself absolute, unless cause be shown as above (a).

(a) In *Towgood, Dimock and others v. Morgan the younger*, in *Easter Term*, 12th May, 1832, the claimant, *Samuel Morgan* the elder, made default to appear in a similar rule, and the following order was made:—

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| <p><i>Towgood and others</i> against</p> | } | <p>Upon reading the rule of the 26th day of <i>April</i> last, the affidavit of <i>Thomas Pritchard</i>, and the affidavit of <i>Charles Sweeting</i>, and hearing <i>Mr. R. V. Richards</i> for the Sheriff of <i>Monmouthshire</i>, <i>Mr. Robinson</i> for the plaintiffs, and <i>Mr. Manning</i> for <i>John Dimock</i>, in the said rule named, Ordered that the said Sheriff do obey the writ of <i>Fi. Fa.</i> in the said Rule mentioned, and that the claim of <i>Samuel Morgan</i>, the elder, to the goods in question be barred; and that the said <i>Samuel Morgan</i>, the elder, do pay to the plaintiffs and <i>Mr. John Dimock</i>, and also to the said Sheriff or their respective attorneys, the costs occasioned to them by this application." But in the principal case, as well as in <i>Bowdler v. Smith</i>, 1 Dowl. 417; and <i>Burton v. Skey</i>, id. 428; no costs were allowed to the sheriff, and that appears to be the practice.</p> |
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The KING *against* THOMPSON.

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MANSEL moved for a rule to show cause why the clerk of the peace for the county of *Buckingham* should not return into this court all recognizances, estreats and warrants entered into by the defendant and his sureties, *J. K.* and *H. H.*, for the appearance of the said defendant on the traverse of three several indictments preferred against him at the *Michaelmas* sessions, and all proceedings thereupon. A week's notice of the motion had been given to the sheriff.

Three indictments were found at the *Bucks* sessions, in *October* 1831, against the defendant, for assaults. At the *Epiphany* sessions 1832 he appeared, put in bail, and pleaded, and traversed to the *April* sessions, entering into the usual recognizances, himself in 50*l.* and his two sureties in 25*l.* each on each indictment. He did not give the notice of trial at the *April* sessions which it appeared was usual, according to the practice (a), but a week before the sessions (b) gave notice to the prosecutor's attorney that he would move that court to respite the recognizances. No notice of trial was given by the prosecutor. At those sessions the traverse books having been paid for and the traverses entered, and the costs of the copies of the records, summoning the jury, filing the returns, entering appearances to traverses, and reading records, being paid to the clerk of the peace, it was moved to respite the recognizances; but the application was refused, and the recognizances were ordered to be estreated; but the sessions recommended application for relief to this court. The defendant and his sureties were present in court

Indictments for assault had been traversed on recognizances by defendant and two sureties to appear, enter and try the traverses at the next sessions. The traverser gave the prosecutor no notice of trial before the next sessions, but moved there to respite the recognizances to the next sessions; which application was refused, and they were ordered to be estreated.

Warrants of execution issued under 3 G. 4. c. 46. s. 6. against the defendant and his sureties. On motion to bring the recognizances, estreats, and warrants into the court of exchequer:—Held, that the court had no jurisdiction over estreats not returned into it, and that the quarter sessions only had jurisdiction to relieve.

(a) The notice of the defendant's intention to try is not a condition precedent to the trial, but a mere regulation of practice, a non-compliance with which may be cured by the prosecutor's appearing. *Res v. Hobby*, Ry. & M. 241.

(b) *Semble* he was then in time to have given notice of trial. See 5 Burn, tit. Traverse.

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at the sessions, but the prosecutor was not ready to try. Warrants were issued under writs from the court of quarter sessions against the defendant and his sureties, in the form in 3 G. 4. c. 46. s. 14. sched. A.; the goods of one of the sureties were seized, and the person of the other, as well as of the defendant; but the recognizances had not been estreated or returned into this court at the time of the motion (a).

Mansel contended that the exchequer had a contemporaneous jurisdiction with that of quarter sessions, notwithstanding 3 G. 4. c. 46. s. 6. and prayed that the recognizances might be estreated into this court, in order subsequently to move for their discharge, on producing a constat of the estreat. He attempted to distinguish *The King v. Hankins* (b).

LORD LYNTHURST C. B.—The sessions having refused to respite these recognizances, they were forfeited. Then a copy of the roll directed to be made of them, by 3 G. 4. c. 46. s. 2. having been sent to the sheriff with the writs prescribed by schedule A., warrants have issued, which have been acted on against these sureties in the usual way. Now the act 3 G. 4. was passed to give the quarter sessions a jurisdiction they did not before possess; and that court is empowered by sect. 6. at a sessions subsequent to that at which recognizances are forfeited, to inquire into the circumstances of the case, and at its discretion to order the discharge of the whole of the forfeited recognizances. In this case the sessions intended that the application for relief, which they recommended to be made to this court, should be made when the estreats came in, according to the practice of the court. But *Rex v. Hankins* is distinctly in point. In that case this question was

(a) This case occurred in Trinity term 1832, but the report of it could not be prepared in time to appear in its proper place.

(b) *M'Lelland & Younge's R.* 27.

considered, and the court, after hearing *Pellow's* case (a), and having had their attention drawn to the standing writ of privy seal, empowering the barons to discharge forfeitures *estreated* into the court, decided that they had no jurisdiction over recognizances forfeited at quarter sessions, but not *estreated*, though the yearly certificate of them had been delivered into the court under section 14 of 3 G. 4. c. 46. Relief had been there refused by the sessions to the party on his application under the act; but this court held that its jurisdiction did not exist, as no *estreats* had taken place.

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BAYLEY B.—The defendant having traversed, could not try the indictments so traversed without notice given, unless the prosecutor appeared. His neglect to give that notice occasioned these recognizances to be forfeited, and the justices had no power to refer the case to this court. *Hankins's* case is in point.

BOLLAND B.—The sessions have not decided on any appeal to them under this act.

The Court said they would communicate with the king's remembrancer.

On another day

VAUGHAN B. stated, that the king's remembrancer had certified the practice to have followed the cases of *Hankins* and *Pellow*; and that the court remained of opinion that the relief prayed was within the jurisdiction of the quarter sessions only.

Motion refused (b).

(a) M'Lelland's R. 111.

(b) See 1 Gude's Crown Practice, 227.

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DOE *dem.* WILLIAMS *against* EVANS.

Matter purporting to be a will of lands, but unexecuted, was written on the two first sides of a sheet of paper, on the third side of which a codicil entitled "Codicil," and referring to "the foregoing will," was afterwards written, and was duly signed and attested. Held, that that due execution gave effect to the will, and conferred on it validity to pass lands.

EJECTMENT for premises called *Francis Well*, situate in the county of the borough of *Carmarthen*. The lessor of the plaintiff claimed as devisee of *David Evans*, against the defendant, claiming as his heir at law. By the instrument relied on by the lessor of the plaintiff, as the will of *David Evans*, that person gave, devised, and bequeathed all his real and personal property unto his wife, *Ann Evans*, for her use and benefit, so long as she should remain unmarried. He also gave and devised a freehold property called *Francis Well*, in the county of the borough of *Carmarthen*, to his nephew, *David Williams* (lessor of the plaintiff), of the parish of *L., Cardiganshire*, and to his heirs for ever, after the death of the said *Ann Evans*, testator's wife. The concluding sentences were, "And lastly, I do hereby nominate, constitute, and appoint (a blank in the original), of this my will, hereby revoking all former wills by me at any time heretofore made, and declaring this to be my last. In witness whereof I have to this my will set my hand and seal this 8th *December* 1829."

The above part of the will was written on the first page of a foolscap sheet of paper; then followed on the second page the following attestation:

"Signed, sealed, and published by the within-named *David Evans*, as his last will and testament, in the presence of us, who at his request, in his presence, and in the presence of each other, have hereunto set and subscribed our names as witnesses hereto."
(*No signature or seal.*) (*No signature of witnesses.*)

Lower down, upon the same second page was written a codicil, as follows, in the hand-writing of the same person who prepared the will:

"Codicil. I, *David Evans*, make a codicil to the foregoing will, and thereby ordain that my wife, *Ann Evans*, be entitled to the sum of two hundred pounds of my property in case she should marry. (*No date.*)

"*David Evans.* (*No seal.*)

"Witness, *John Williams*,
John Henry Logingoch,
William Howell."

Testator died in August 1831, without revoking or altering his will.

At the trial before *Alderson J.*, at the last assizes for the county of the borough of *Carmarthen*, it appeared that in *December 1829*, the testator had requested a dissenting minister to prepare a will for him. It was done accordingly, and contained a devise to the lessor of the plaintiff of the property sued for, but left a blank for the names of the executors, and had no signature or seal whatever. A short time after, testator sent again to the same minister, saying he wanted a codicil to his will; a codicil was prepared as above stated, without date or seal. One of the subscribing witnesses named in the attestation proved that he was sent for by the testator on *30th January 1829*, and on getting there found *Williams* and *Howell* there. Testator said, that what he wanted with witness was to sign his will. He desired Mr. *Williams* to go for the desk, saying his will was in it. The desk being accordingly brought, and placed on the table, the testator unlocked it, and taking out a paper said, "here it is:" he opened it and folded up part, and then wrote his name in presence of all three witnesses. He said, after writing his name, that was his will; that he did not intend to make any other. The attesting witnesses then signed their names.

On this evidence, *Alderson J.*, directed the jury that there was only one question for them, whether, when

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David Evans signed the codicil, he meant to execute both instruments, and told them that if they believed that he did so mean, the execution was good as to both, and they must find for the lessor of the plaintiff; but that if they believed that the testator thought he had already executed the will, and that the will was done with, then the execution was invalid, as far as setting up the first instrument to be a will, and the defendant must have a verdict.

Whitcombe moved for a new trial. The will, as originally made, was in its inception void, for want of signature and attestation. Being so, it cannot be set up by matter *ex post facto*; *Attorney-General v. Barnes* (a). —[*Bayley B.*—The publication of the codicil brings down the will, making it speak as if the date of that publication, unless it is shown that the testator intended not to give that effect to the will, but only to execute the codicil, *Carleton dem. Griffin v. Griffin* (b).]

The question is whether the testator executed the codicil *eo animo* of publishing the will: now the will, as originally framed, was clearly imperfect, a blank having been left for the names of executors, though the testator's expressions demonstrate his intention to appoint them. Then the testator, by suffering that omission to continue in the will, at the time of executing the codicil, showed that he did not mean to treat the former as a perfect will; *Carleton v. Griffin* differs materially in this, that the latter part of the

(a) 2 Vern. R. 597, Prec. Ch. 439, S. C. The report of the case in Gilb. Eq. R. 5, shows that the will and codicil were on different papers. The will was signed by testator, but not attested so as to pass real property. The codicil was duly signed and attested as testator lay on his death-bed, but the will was in a drawer in the testator's closet, and was not produced at the time of that execution.

(b) 1 Burr. 549.

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matter there set up as a will and codicil, not only referred to the former part, contained on the same sheet of paper, and not attested, so as to pass real estate, but recognized it as valid and existing, by adding "and this not to disannul any of the former part made by me 2d of May 1752." Lord *Mansfield* there says (a), "The case is accurately stated; for it is not stated to be either a will or a codicil, but a sheet of paper, written, &c. The testator makes a subsequent disposition, which is a memorandum to be added to it; but he does not call this a codicil, nor does the case state it to be one. He plainly considers the whole as an entire disposition. Then the publication of it is as of a will; he takes up the paper, and says, it is my will; and certainly he did not mean a part of it only, but the whole of it, and he desires them to attest it: all this must relate to the whole that was written on the paper:" and Mr. Justice *Wilmot* there relies on the testator calling it a memorandum, and not a codicil. But here the codicil subjoined is headed as such, and calls the former part "the foregoing will," the facts proved being, that instructions were given for a codicil at a subsequent period to the framing the will, and that that codicil only was executed.

BAYLEY B.(b)—We should do an injury to this applicant if we granted him this rule, for after the authority of *Carleton v. Griffin*, and considering the strict analogy between the principle of that decision and the present, such a rule must ultimately be discharged. In this case the party makes what he means to be his will at some time or other, though he does not make it his will at the time, because it was not signed or attested. Then the question is, whether or not the codicil, which was duly signed and attested on a sub-

(a) 1 Barr. 553, 554.

(b) Lord *Loughurst* was sitting in equity.

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sequent occasion, will have effect alone, or whether its execution will apply to and establish the preceding will. The will was written on the first and second sides of a sheet of foolscap paper, the codicil on the third; and if the codicil had not referred to the will, I should be of opinion it would not have set up that document; but as it does refer to it, I am of opinion that it does set it up. The term codicil implies something added to a previous document. Here the words are, "Codicil. I, *David Evans*, make a codicil to the foregoing will, and thereby ordain that my wife, *Ann Evans*, be entitled to the sum of two hundred pounds of my property in case she should marry." To this codicil there is the testator's signature, and that of three witnesses, so that by that execution the testator appears to me at that period of time to have set up not only the codicil but the will.

The only distinction, in fact, between this case and that of *Carleton v. Griffin* is, that in that case the first will was signed by the testator, whereas here it was not; but that makes no difference in law, for the signing that will of lands did not make it operative. In order to give operation to that will the Court must have been of opinion that they were entitled to consider the due execution of the codicil as applying not only to give effect to the codicil itself, as such, but to that which was previously done in 1752, in order to making a will. The language of that codicil was merely "not to disannul any of the former part;" now the court, by their decision, not only do not disannul but establish the former part as a will; whereas here by the codicil the testator declared the foregoing matter to be his will. I cannot distinguish that case from the present; and independently of that authority, I should have thought it consistent with reason to hold, that the signature and attestation of a codicil on the same paper with a will, must have appli-

cation to all the matter written upon that paper. But the express reference of this codicil "to the foregoing will" shows the intention of the testator that both instruments should operate.(a)

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BOLLAND B.—I concur. Had this will been signed by the testator, the case would have been exactly that of *Carleton v. Griffin*: but the absence of signature to the will here *sub judice* makes no real difference, as the wills were in both cases equally inoperative for want of the attestation required by law. The words "Codicil. I, *David Evans*, make a codicil to the foregoing will," are as if he had said, I add this to what I did some time ago.

GURNEY B. concurred.

Rule refused.

(a) *Vaughan B.* was sitting at *Nisi Prius*.

JOHN WHEELER *against* WILLIAM DUKE, GEORGE DUKE, JOHN LIGHTWOOD and SARAH his wife, JOHN DUKE and ELIZABETH DUKE, WILLIAM DUKE the younger, ELIZABETH LIGHTWOOD, THOMAS LIGHTWOOD, WILLIAM DUKE, son of GEORGE DUKE, GEORGE DUKE the younger, SARAH DUKE, JOHN DUKE the younger, MARY ANN DUKE, MARIA DUKE, ANN CLEMENTS, and ANN DUKE, widow.

THE Master of the Rolls sent the following case for the opinion of this court. *George Duke*, since deceased, being seised in fee previously to and in con-

Real property was conveyed by marriage settlement to trustees to the use of the husband for life, and after his decease, to the use and intent that his wife, if surviving, should receive a weekly sum out of the rents; and subject thereto that the trustees should thereafter stand possessed of the residue of them, to the use of *all and every the child and children of the settlor's former wife* (naming them) *and their issue lawfully begotten and to be begotten*, equally to be divided between and amongst them as tenants in common, and not as joint-tenants, *and his, her, or their respective issues*. Held that the children of the first marriage took for life, subject to the widow's allowance, and that grandchildren born after the settlement, whether before or after the death of the settlor, their grandfather, took no estate.

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templation of his marriage with *Ann Grove*, now the defendant *Ann Duke*, by indenture of lease and release, bearing date respectively the 2d and 3d days of *April* 1818, between the said *George Duke* of the first part, the said *Ann Grove* of the second part, the said *Ann Clements* the plaintiff, *John Wheeler* and *Thomas Harrison*, since deceased, and the defendant *William Duke*, the son of the said *George Duke*, of the third part, reciting that the said *George Duke* was seised in fee of a piece of land and sixteen messuages or dwelling-houses which he had erected thereon, and premises in *Walmer Lane*, in *Birmingham*, being the premises thereby released, and that a marriage was intended to be had and solemnized by and between the said *George Duke* and *Ann Grove*, and that it was agreed by and between the said *George Duke* and *Ann Grove*, upon the treaty of the said marriage, that in case the said *Ann Grove*, the said intended wife of the said *George Duke*, should survive him the said *George Duke*, she should receive out of the rents and profits of the said sixteen messuages or dwelling-houses erected upon the said piece of land, for and during the term of her natural life, the sum of fourteen shillings per week, and that the residue of the rents, issues, and profits of the said sixteen messuages or dwelling-houses, from and after the decease of the said *George Duke*, should be equally divided between and amongst the then children of the said *George Duke* by his former wife, namely, *William*, *George*, *Sarah*, *John*, and *Elizabeth*, and their issue, and for which purpose the said *George Duke* had agreed to grant and convey the said piece of land, sixteen several messuages or dwelling-houses and premises, upon the trusts and for the several ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same, he, the said *George Duke*, in pursuance of the said agreement, and

in contemplation and prospect of the said marriage, and for the purpose of making a provision for the said *Ann Grove*, in case the said marriage should take effect, and she should survive him, and also in consideration of ten shillings to be paid to the said *George Duke* by the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, granted, bargained, sold, released, and confirmed unto said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, their heirs and assigns, all the said premises in *Walmer Lane*, hereby released, to hold the same, with their appurtenances, unto the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, their heirs and assigns for ever, to the use of the said *George Duke* during his life ; and from and after the decease of the said *George Duke*, in case the said *Ann Grove*, his said then intended wife, should survive him, and be then living, to the use, intent, and purpose that the said *Ann Grove*, the then intended wife of the said *George Duke*, or her assigns, should from time to time and at all times during her life, from and out of the yearly rents, issues, and profits of the said premises, receive the sum of fourteen shillings weekly and every week, to and for her and their own sole use and benefit, and subject thereto, that the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, should from time to time and at all times thereafter stand possessed of the residue of the said clear yearly rents, issues, and profits of the said piece of land and sixteen messuages or dwelling-houses and premises, to the use of all and every the child and children of the said *George Duke* by his former wife, namely, *William Duke*, *George Duke*, *Sarah Duke*, *John Duke*, and *Elizabeth Duke*, and their issue lawfully begotten and to be begotten, equally

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to be divided between or amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her, or their respective issue; and from and after the death of the said *Ann Grove*, the intended wife of the said *George Duke*, upon further trust that they the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall from time to time and at all times hereafter stand possessed of the said weekly sum of fourteen shillings, in trust for all and every the child and children of the said *George Duke* by the said *Ann Grove*, his intended wife, which shall be living at the time of the death of the said *Ann Grove*, and the said *William Duke*, *George Duke* (the son), *Sarah Duke*, *John Duke*, and *Elizabeth Duke*, or their issue lawfully begotten and to be begotten, equally share and share alike; and in case there shall be no child or children of the marriage of the said *George Duke*, the father, and the said *Ann Grove*, or in case of there being such, and all of them shall die without leaving lawful issue living at the decease of the said *Ann Grove*, then upon trust that they the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall from time to time and at all times hereafter stand possessed of the whole of the said clear yearly rents, issues, and profits of the said piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises lastly hereby released and conveyed, or mentioned and intended so to be, upon trust for all and every the said *William Duke*, *George Duke* (the son), *Sarah Duke*, *John Duke*, and *Elizabeth Duke*, and their issue, or the survivors or survivor of them, and their issue, equally to be divided between or among them who shall be then

living and their issue in equal shares and proportions, as tenants in common and not as joint tenants, and his, her, and their respective issue : and upon further trust, that in case any one or more of the said *William Duke, George Duke* (the son), *Sarah Duke, John Duke, and Elizabeth Duke*, shall die without leaving lawful issue of his, her, or their body or respective bodies, living at his, her, or their death or respective deaths, then that they the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall from time to time and at all times hereafter stand possessed of the said yearly rents, issues, and profits of the said piece or parcel of land or ground, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises lastly hereby released, conveyed or mentioned, and intended so to be, upon trust for the survivors and survivor of them the said *William Duke, George Duke* (the son), *Sarah Duke, John Duke, and Elizabeth Duke*, and their issue ; and in case all of them the said *William Duke, George Duke, Sarah Duke, John Duke, and Elizabeth Duke*, shall die without leaving lawful issue of his, her, or their body or bodies, then that they the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall stand possessed of the said rents, issues, and profits of the said last-mentioned piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises, and the same piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises, upon trust for the right heirs of the said *George Duke* the elder for ever, and to and for no other use, trust, and intent or purpose whatsoever.

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The said *George Duke*, the settlor, died on the 21st of November 1827.

The said *William Duke*, *George Duke*, *Sarah*, now the wife of *John Lightwood*, *John Duke*, and *Elizabeth Duke*, who were the children of the said *George Duke* by his former marriage, are still living; none of them had any issue born at the date of the said indenture of settlement; but between that time and the death of the settlor the following issue of the children of the said *George Duke* by his former marriage were born, that is to say, *William Duke*, the youngest son of *William Duke*, *Elizabeth*, daughter of *Sarah Lightwood*, *William Duke*, *George Duke*, *Sarah Duke*, and *John Duke*, children of *George Duke*, making six grandchildren of the settlor, born between the date of the said indenture of settlement and his death. Since the death of the said *George Duke*, the settlor, the said *Sarah Lightwood* has had another child, namely, *Thomas Lightwood*; and the said *John Duke*, the son of the settlor, has had issue two children, namely, *Mary Duke* and *Maria Duke*, making three grandchildren of the settlor, born after his death.

The questions for the opinion of the court are,

1. Whether any and what estate and interest in the said piece of land and sixteen houses and premises erected by the said *George Duke* thereon, passed by the said indentures of settlement, bearing date the 2d and 3d of April 1818, to the said *William Duke*, *George Duke*, *Sarah Lightwood*, *John Duke*, and *Elizabeth Duke*.


2. Whether any and what estate and interest in the said piece of land and sixteen houses and premises passed by the said indentures of settlement to *William Duke*, son of *William Duke*, *Elizabeth Lightwood*, *William Duke*, *George Duke*, *Sarah Duke*, and *John Duke*, children of *George Duke*, being the six grand-

children of the said *George Duke*, the settlor, who were born between the date of the said indentures of settlement and his death.

3. Whether any and what estate and interest in the piece of land and sixteen houses and premises passed by the said indentures of settlement to *Thomas Lightwood*, *Mary Duke*, and *Maria Duke*, the three grandchildren of the settlor, who were born after his death.

Barber for the defendants *George Duke*, *Sarah Lightwood*, *John Duke*, and *Elinabeth Duke*. These persons being heirs of settlor at the time of making the settlement, may be said to have taken an estate tail on the authority of one case, *Galley v. Barrington*(a), where an estate of inheritance was held to pass without the word *heirs*. [*Bayley B.* The court there proceeded on the apparent intention of a testator, and thought they could supply the omission of the words "heirs of the body of the first son," from the other parts of the will.] This, however, is the case of a deed.

At all events these children take an estate for life; for the words are, "to the use of all and every the child and children of the said *G. D.* by his former wife (naming them), and their issue lawfully begotten." *Coke* on *Littleton*, 20 *b.* is in point, where it is said, "If a man give lands or tenements to a man *et semini suo*, or *exitibus vel proliis de corpore suo*, to a man and his seed, or to the issues or children of his body, he hath but an estate for life." [*Bayley B.* Would not the limitation, being by way of remainder to the issue nominatim, let in the other children?] No, for the cases establish that every limitation to a man and his issue is only an estate for life. The settlor has given the life estate to persons

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(a) 2 Bing. 387.

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in esse at the time of the settlement, and capable of taking for life in conjunction with *William Duke*, the heir at law.

Piggott for *William Duke* the heir. On the death of *George Duke*, the settlor and tenant for life, the heir became entitled to the whole estate, subject to the payment of 14s. a-week to *Ann Duke*. The court is bound to give effect to all the words in the deed. From the recitals it appears that the settlor was seised in fee, and intended that the issue of the children of the first marriage should take as well as the children; and in the operative part of the deed the trustees and their heirs are directed "from time to time and at all times thereafter," (*viz.* the death of *George Duke*, the tenant for life,) to stand possessed of the residue of the rents, issues, and profits, to the use of all and every the child and children of the former marriage and their issue, lawfully begotten and to be begotten, equally to be divided between them, in equal shares, as tenants in common and not as joint tenants, and his, her, and their respective issue."


It is admitted that under that limitation none of the objects of the settlement could take any greater estate than for life; and as the trustees are to stand possessed from time to time and at all times after the death of the tenant for life, for the children and their issue, and the issue of such issue, it must be considered that the intention of the settlement was, that issue to the most remote generation should immediately, as they respectively came *in esse*, and at any future period of time, take as purchasers, in conjunction with the children of the first marriage. The limitation is consequently void as being too remote, but a remainder once vested in possession cannot be opened. The word

"issue" in the deed is a word of purchase, and must have effect given to it. In *Fitzherbert v. Heathcote*, cited by the M. R. in *Bayley v. Morris* (a), there was a limitation by deed to the father for life, remainder after his decease to his issue male, and for want of such issue, to the father in fee; and it was held that the father had an estate for life, remainder to his three sons, as joint tenants for life only, remainder to the father in fee; but the present case differs from that, because, by the settlement, the *issue* are to take together with the children of the first marriage, and not by way of remainder after the deaths of their parents. Nor is this case at all like those where the limitation has been confined to children or issue, viz. grandchildren born before the death of the settlor, or deviser's death, as in *Mogg v. Mogg* (b); for the provision that the trustees and the survivor of them, and the heirs of the survivor, should "from time to time and at all times hereafter" stand possessed of the residue of the clear yearly rents, &c., cannot be rejected. Those words distinctly show the settlor's intention that the children should take an estate for life, subject to be abridged from time to time, as other children or their issue should arrive to the remotest period, and that thus the remainder, though vested in possession, should open. That intention being contrary to the rules of law, the heir is entitled to the whole on payment of 14s. a-week to the widow *Ann Duke*.

[*Bayley B.* Might not the remainder open again before it was vested in possession, as issue was born during the life-time of *George Duke*, the settlor, or *Ann*, the wife (c) ?]

(a) 4 Ves. jun. 794. (b) 1 Merivale, 663; Question IV. and 689.

(c) See *Oates v. Jackson*, 2 Stra. 1172; cited 1 Merivale, 682, 684; and *Boyce v. Hanning*, ante, Vol. II. 327.

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Cooper for the six grandchildren born before the settlor's death, viz. *W. Duke, E. Lightwood, W. Duke, G. Duke, S. Duke, and J. Duke*. The children of the settlor, who are parents of the above persons, have been shown by *Mr. Barber* to take estates for life at all events; consequently these grandchildren, though not born at the date of the settlement, still having been born since, and pending the particular estates for life, take, as "issue" of the children named in the settlement, an equal share with them as tenants in common. The claim in the settlement has provided for the event which has happened. Had this been a will, the word "issue" would have created an estate tail in the issue, that word in a will being a word of limitation, and not of purchase; though even in a will it will have the latter construction, if expressions are found inconsistent with that intention to give an estate tail, which would otherwise be presumed, *Doe v. Elvey* (a), *Doe v. Burnsall* (b), *Doe v. Dacre* (c).


This however is a deed in which the words, "their issue," occur not in a limitation *in præsentis* but by way of remainder; therefore every person coming into being during the existence of the particular estate, and being "issue" within the remainder, is capable of taking, and entitled to take; for the remainder will open to let him in. Had any of the children had issue at the making this settlement, they would have taken a vested interest. The deed provides that the children and their issue shall take as tenants in common, and not as joint tenants; but had its terms been otherwise, 2 *Preston on Abstracts*, p. 67, 68, has this passage: "Though at common law joint tenants must be capable of taking at one and the same time, yet under the learning of uses and executory de-

(a) 4 East, 313.

(b) 6 T. R. 30.

(c) 1 Bos. & P. 250.

vices, persons may be joint tenants who take at different times; thus under a devise or limitation to the use of children of *A.*, the estate may vest altogether in one; afterwards, when a second child is born, in two; and afterwards, on the birth of a third child, in the three; and so on progressively as the children are born." Upon this principle Lord *Eldon* acted in *Mogg v. Mogg* (a). That case shows the word "issue" in a deed, to be a *designatio personarum*, not a stock *quâ* limitation, but as pointing out persons who are to take when a remainder is to vest in possession, and to have the like effect as if the persons to take had been specially named; for when the remainder vests, the persons who come into existence in the settlor's life, and answer the description given in the settlement, may be ascertained; and the maxim, *id certum est quod certum reddi potest*, applies.

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Barber in reply. Do "the issue" take? Now no case has been cited to show that where, by a deed or will, an estate is given to *A.* and his issue, the issue take jointly and at the same time with *A.* By this deed the issue are clearly intended to derive the estate from their parents, the settlor's children, and not to take jointly with them.

Lord LYNDEHURST C. B.—My present impression is, that the five children take an estate for life.

The following certificate was afterwards sent.

Taking it for granted that the indenture of settlement of 2 and 3 April 1818, vests the *legal* estate in the persons beneficially entitled under it, (which has not been argued before us, and upon which we express

(a) 1 Merivale, 634.

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no opinion,) we are of opinion that an estate for life, subject to the widow's 14s. a week, in the said piece of land and houses, passed by the said indenture of settlement to the said *W. Duke, G. Duke, S. Lightwood, J. Duke*, and *E. Duke*.

We are of opinion that no estate or interest passed to any of the six grandchildren of the settlor, who were born between the date of the settlement and his death, or to the grandchildren born since.

LYNDHURST.

J. BAYLEY.

W. BOLLAND.

J. GURNEY.

Torriano appeared for *Thomas Lightwood, Mary* and *Maria Duke*, born after the settlor's death.

Koe appeared for the plaintiff and the trustees under the settlement.

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EMMA MARIA JOHNSON and Others, infants, by the said E. M. JOHNSON, their next friend, *against* WILLIAM EAGLES JOHNSON.

IN this cause, which was instituted pursuant to a decree of the Court of Chancery, certain issues relating to the execution and effect of the will of Mr. *William Eagles Johnson*, deceased, came on for trial before Mr. Baron *Bayley*, at the *Middlesex* sittings after last *Trinity* term, it being ordered by the decree that any special matter should be indorsed on the postea.

The first issue was, whether the will in question was duly executed to pass real estates by devise.

The second issue was, whether admitting the will to have been duly executed to pass real estates, it was not rendered inoperative as regarded a certain house and lands, called *Portway Hall*, and lands called *Nimmings*, being parts of the testator's freehold estates, by certain deeds executed by the testator subsequently to the date of his will.

The jury found a verdict for the plaintiffs upon the first, and for the defendant upon the second issue, subject to the opinion of the court upon the following case.

The plaintiffs were the children of the testator *W.*

off the old mortgage, and take an assignment of the subsisting term to secure the 1200*l.* and a further loan of 1800*l.* The 1200*l.* was to be paid off first, and the term was in the meantime to be assigned to *B.* in trust for the devisor : which *B.* afterwards, on *A.*'s paying devisor the 1800*l.*, was to assign to *A.*

The 1200*l.* was paid off accordingly, and the term was assigned to *B.* in trust for the testator, his heirs and assigns, to be held, assigned and disposed of as he or they should direct or appoint, and the term was soon afterwards assigned by *B.*, the trustee, by direction of devisor, to *A.*, to secure the two sums of 1200*l.* and 1800*l.*—Held, that the will was not revoked ; for the devisor's estate, (*vis.* his reversion) was unaltered by the assignment of the term to a fresh mortgagee.

A court of common law will decline to decide on a question arising on an issue directed to it out of chancery, and which involves a right merely equitable ; particularly *comm. semb.* where the rules of law and equity differ on the question.

A will subscribed by three witnesses in testator's presence, and at his request, is duly executed so as to pass real property, though the testator did not sign it in the presence of any of them, and only two saw his signature.

A reversioner expectant on the determination of a term of years, created on mortgaging the premises for 1200*l.*, devised the same by will duly executed and attested. By subsequent deed he agreed with *A.* that *A.* should pay

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E. Johnson, and the defendant is also his infant son and heir at law. In *June* 1826, the testator came from his counting-house into his shop, with a paper in his hand, which was his last will and testament, (the whole of which, except the witness's signatures, was in his handwriting), and desired *E. S.*, one of his shopmen, to witness it. The counting-house is separate from the shop by a glass-door, but behind the counter there is no separation at all between them. *E. S.* went into the counting-house, and, in the testator's presence, signed the said paper. The testator then called in *E. R.*, another shopman, who, at his request and in his presence, also signed the said paper as a witness. Afterwards the testator called in *G. W.* another of his servants in the shop, who also in the testator's presence signed the paper as a witness. This said paper had been signed by the said testator previous to his requiring any of the said persons to witness it, and his signature thereto was then seen by the two first witnesses thereto. *E. S.* was present when *E. R.* and *G. W.* attested the said paper, and *E. R.* was also present when *E. S.* signed, but *G. W.* was not in the counting-house when *E. S.* attested the same, though he was in the shop. *E. R.* and *G. W.* were in the counting-house when they respectively signed their names as witnesses. The said paper was produced at the trial of the issue, and identified by all the witnesses as the same which the testator so required them to sign as witnesses aforesaid.

Daniel Johnson, the father of the testator, being seised in fee simple of a freehold mansion house and lands, called "*Portway Hall*," and certain closes called "*Nimmings*" respectively, situate at *Rowley Regis*, in *Staffordshire*, executed a mortgage by which the said house and lands called "*Portway Hall*" were conveyed in fee, and the closes called "*Nimmings*" de-

mised for a term of 500 years to *Nancy Woolley*, for securing the sum of 1200*l.* and interest. *D. Johnson* did not pay off any part of this sum at the time appointed by the mortgage, and by his will devised the said estate comprised therein, to the testator *W. E. Johnson* in fee, subject to an annuity of 20*l.* which he bequeathed to one *Sarah Olden* for her life. The testator *W. E. Johnson* was also at the time of making his said will, and at his death, seised in fee of certain copyhold estates, and was tenant in tail of a freehold estate at *Deritend*, in *Warwickshire*; he was also possessed of certain leasehold estates in *London*. He continued to pay the interest on *Mr. Woolley's* mortgage till the assignment thereof hereinafter mentioned, and such mortgage being subsisting on the 27th *June* 1826, he made his said will and executed the same as hereinbefore mentioned. The following is a copy of it.

“ As I am going a journey, and am commanded to set my house in order, that I shall die and not live, I hereby make my last will and testament. In the first place, I give in trust unto my esteemed friend *Mr. William Underwood*, *Mr. Mark Magridge*, and my faithful wife *Catherine Johnson*, for the benefit of my children, after allowing my wife two hundred pounds a year during her natural life for her own use, which is to be secured on any part of my property they may think proper, the whole of my freehold, leasehold, and copyhold in the counties of *Stafford*, *Salop*, *Worcester*, *Warwick*, and *Middlesex*, with all my personal property of every description, I give to them; after the above allowance to my wife as long as she continues unmarried and a widow; if she marries again, then she is to be allowed fifty pounds a year instead of two hundred, and her trust also ceases, as she will no longer be trustee. I will that my children receive their

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equal proportion as they attain twenty-five years of age out of the personal property, and their proportion of the income from the estates. I request the trustees to sell any part of the mines under any part of my property, when they consider the most beneficial time to my children's benefit, the estates also, if they consider it of more benefit than keeping them. It is my request that when my daughters marry that what fortune they have should be settled on them and their children. If by the sale of mines the property should be much increased, I will that one-fourth part be funded for the benefit of my wife, in addition to the aforesaid income if she continues a widow, and after her death the said property funded to be disposed of agreeable with her will, and in case she dies without a will to be divided among my daughters, share and share alike. As witness my hand this 27th day of *June* 1826, *William Eagles Johnson*. Witness, *Edward Standerwick, Edward Richardson, George Walker*."

In *May* 1829 the testator applied to Mr. *Day* to advance him 3000*l.* upon the security of the said estate called "*Portway Hall*," and the closes called "*Nim-mings*," mortgaged as before mentioned to Mrs. *Woolley*, and which mortgage was then vested in her representatives. Mr. *Day* having assented, it was arranged that he should first provide 1200*l.* to pay Mrs. *Woolley*'s representatives, and that the said mortgaged property should be conveyed and assigned to a trustee, who should afterwards, upon Mr. *Day*'s advancing the testator the residue of 3000*l.*, convey and assign the same to him.

Accordingly by indentures of lease and release and assignment, bearing date the 8th and 9th of *May* 1829, the release and assignment being made between *B. Woolley* (only son and heir at law of the said Mrs. *Woolley* then deceased) of the first part; the said *B.*

Woolley and *J. Bourne* the younger (two of the trustees and executors of the will of Mrs. *Woolley*), of the second part; *H. Dudley*, the other executor of the will of Mrs. *Woolley*, of the third part, the testator *W. E. Johnson* of the fourth part, and *H. W. Bull*, of the fifth part. In consideration of the sum of 1200*l.* the said *B. Woolley*, at the request of the said *J. Bourne* the younger, *H. Dudley* and *W. E. Johnson*, bargained, sold, aliened, released and confirmed, and the said *J. Bourne* the younger, and *H. Dudley*, remised, released, and for ever quitted claim to the said mansion house and lands at *Portway*, in the parish of *Rowley Regis*, in the county of *Stafford*, unto and to the use of the said *H. W. Bull*, his heirs and assigns for ever, in trust for the testator *W. E. Johnson*, his heirs and assigns, and to be conveyed and disposed of as he or they should direct or appoint; and by the same indenture the same *B. Woolley*, *J. Bourne* the younger, and *H. Dudley*, (at the request of the testator *W. E. Johnson*) bargained, sold, assigned, transferred and set over the said closes called "*Nimmings*," and the other premises comprised in the said term of 500 years, unto the said *H. W. Bull*, his executors, administrators and assigns, for the residue of the same term, in trust for the testator *W. E. Johnson*, his heirs and assigns, and to be held, assigned, and disposed of as he or they should direct or appoint. Shortly after the date and execution of those deeds, pursuant to the arrangements before mentioned, Mr. *Day* advanced the further sum of 1800*l.*, and by indentures of lease and release and assignment, dated respectively the 29th and 30th of *May* 1829, the release and assignment being made between the said *H. W. Bull* of the first part, the said testator of the second part, and the said *C. Day* of the third part, in consideration of the sums of 1200*l.* and 1800*l.* advanced by *C. Day*, and for the further nomi-

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nal consideration therein mentioned, the said *H. W. Bull* (at the request and by the direction of the said testator) bargained, sold, aliened, and released, and the said testator granted, released and confirmed the messuage and lands called *Portway Hall*, unto and to the use of the said *C. Day*, his heirs and assigns, subject to the proviso for redemption thereafter contained; and the said *H. W. Bull* (at the like request and direction) assigned to *Day* the closes called *Nimmings*, for the residue of the term of 500 years assigned to him by the before-mentioned deed of the 9th of *May*.

The said deed of the 30th of *May* contains a proviso for redemption, reconveyance and assignment of the premises mentioned therein on payment by the testator to *Day* of 3000*l.* and interest, at 5 per cent., on the 30th of *May* then next.

The testator paid off no part of this principal sum of 3000*l.*, but paid the interest thereon up to the time of his death. He died on the 31st *December* 1829, *without having revoked or altered his said will*, leaving *C. Johnson*, his widow, and the plaintiffs and defendant his only children, him surviving.

It was agreed that the several deeds of the 8th and 9th *May* 1829, and the 29th and 30th of *May* 1829, should be considered as parts of the case.

The questions for the opinion of the court are,

1. Whether the said will of the testator was duly executed to pass real estates? If so, the verdict on the first issue was to stand, otherwise to be entered for the defendant. If the court should be of opinion that the said will was duly executed to pass real estates, then

2. Whether the said deeds of the 8th and 9th of *May* 1829, and the 29th and 30th of *May* 1829, or any of them, operate as an absolute and entire revocation of the testator's will, as regards the said messuage and lands called *Portway Hall*, and the closes called *Nim-*

mings; if so, the verdict found for the defendant on the second issue was to stand, otherwise a verdict was to be entered thereon for the plaintiffs.

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R. Alexander for the plaintiffs. No difficulty arises on the first point, for *White v. The Trustees of the British Museum*(a), and *Wright v. Wright*(b), show decisively that a will of lands need not be signed by the testator in the presence of the subscribing witnesses; and that if they sign it in his presence and at his request, though they do not even know what the instrument signed is, or see the testator's signature on the will, it is duly executed within 29 *Car. 2. c. 3. s. 12*.

On the second point, whether the deeds set forth operated as a revocation of the will, it may be admitted that a partition of freehold by deed and fine after devise is the only instance in which a substantial remodelling of the estate, by conveyance, does not revoke a will, *Luther v. Kirby*(c), *Ward v. Moore*(d), *Risley v. Balinglass*(e), *Knollys v. Alberch*(f). [*Bayley B.* The reason is, that such a deed is only a division of the estate devised.] For the rule is, that an actual conveyance by a deviser of his whole interest in an estate, after he has made his will, operates at law as a revocation of the devise; and rests on the principle, that the deviser must die seised. For as by the statutes of wills, 32 *Hen. 8. c. 1. s. 1*, and 34 & 35 *Hen. 8. c. 5*. a testator must at the time of making his will of freehold be seised of the estate he devises(g), and must continue so seised to the time of his death, any change in

(a) 6 Bingham, 310.

(b) 7 Bingham, 457.

(c) Reported in 8 *Vin. Abr.* 148, tit. Devise, R. 6, pl. 30, from MS. Rep. April, 1730; see 3 *P. Wms.* 169, 170, B. notis.(d) 4 *Madd. R.* 372.

(e) Sir T. Ray. 240.

(f) 5 *Vesey*, 564.(g) *Butler v. Baker*, M. 33 & 34 *Eliz.*; 3 *Co.* 30 b.

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the nature of the estate he had at the time of the making his will, which would divest him of it, though for ever so short a time, would operate as a revocation; 44 *Edw. 3. Year Book*, fol. 33, and *Book of Assize*, lib. 44. pl. 36, cited in *Dyer*, fol. 143, (*P. 3 & 4 Ph. & M.*) and relied on in *Goodtitle v. Otway* (a); even though the testator retakes the same estate, and is revested in the same uses which he had at the time of making his will, and dies seised of them, 1 *Rol. Abr.* 615 Q., pl. 1 (b);—or had no intention to revoke his will, *Goodtitle v. Otway* (c), where the cases previous to 1796 are collected; *Brydges v. The Duchess of Chandos* (d), *Vawser v. Jeffery* (e). [*Bolland B.* mentioned the case of *Darley v. Darley* (f).] That and the numerous other decisions turn on the change of estate produced by the subsequent deed; so that the present case is clearly distinguishable from all of them, and from the great general rule they confessedly establish, on the ground that here was in this case no alteration in the nature of the estate of the testator in the premises. For at the period of executing his will, the testator had an equity of redemption in the *Portway Hall* estate, and also a reversion in fee of the *Nimmings* lands, after a long term. Then, after the mortgage was completed he had precisely the same interest in those premises as before; no such remodelling of the estate took place as makes the general rule applicable; his estate remained unaltered to the time of his death, and his will was not revoked.

[*Bayley B.* He had his equity of redemption and

(a) 1 Bos. & Pul. 578.

(b) And the other later cases cited in 1 Bos. & Pul. 579.

(c) 1 Bos. & Pul. 580, affirmed in error, 7 T. R. 399.

(d) 2 Ves. jun. 433.

(e) 3 Barn. & Ald. 462; 16 Vesey, 519, S. C.

(f) 3 Wils. 6, and cited in *Goodtitle v. Otway*, 1 Bos. & Pul. 584.

reversion on different terms as to quantity, before and after the execution of each of the deeds. For example, after the first execution he would be entitled to the land on payment of 1200*l.*, after the second, on payment of 3000*l.*] The quality of the estate would remain the same, though each deed increased the charges on it. That is sufficient at law, and the point as to revocation *pro tanto*, *quoad* the additional charge by each deed, can only arise in equity. The above distinction from the general rule has been admitted by Lord *Hardwicke* in *Sparrow v. Hardcastle* (a), and the principle laid down by him in *Parsons v. Freeman* (b), is thus stated and relied on by the Master of the Rolls, in *Williams v. Owen* (c), as established; *viz.* that whenever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation; but whenever the testator remains with exactly the same estate and interest, and which may be disposed of by the same means without any fresh modification, there is no revocation.

The quality of this estate remaining the same before and after the mortgages, the plaintiffs are entitled to have this issue certified in their favour.

[*Bayley B.* As to the *Nimmings* closes, the first deed of *May* 1829 kept alive the old term of 500 years first created on the mortgage by testator's father to *Nancy Woolley*; so that as to them the testator had the same reversion after as before the deeds of 1829 conveyed the old term, in which he had no interest, to a new trustee. As to the *Portway Hall* estate, he never had the legal interest in it, either before or after the execution of his will, but the equity of redemption only. Lord *Lyndhurst C.B.* The testator joined in the assignment of 8 and 9 *May* 1829 to the new trustee *Bull*, who conveyed to the new mort-


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(a) 3 Atk. 796.

(b) Ibid, 471.

(c) 2 Ves. jun. 599.

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gaged *Day* by the deeds of 29 and 30 May in the same year; but the testator, after those transactions, had the reversion of *Nimmings* as he had before. As to the *Portway Hall* property, he had nothing before, and has nothing now.]

D. Pollock for the defendant. The cases in 6 and 7 *Bingham* are decisive of the first question, and cannot be distinguished. As to the second, it is allowed on the other side that if any alteration had taken place in the state of the property, though but for an instant of time, it would operate as a revocation: and it was said, that as only the amount of the charge was altered by the last mortgage, the quality of the estate possessed by the testator remained unaltered. But the alteration of the estate in the interval between the first mortgage of 8 and 9 May and that of 29 and 30 May 1829, is overlooked, during which the testator himself became possessed of the legal estate in the *Portway Hall* property, which he had not before; for the conveyance to *Bull* as trustee was not executed in him, but in the testator. As the interval did exist, this argument is not answered by saying that the intention was, that both mortgages should form one transaction; for an intermediate remodelling of the estate had taken place, and the will was therefore revoked; *Williams v. Owen*, *Brydges v. Chandos*, *Harmood v. Oglander* (a). Then the reversion of the term in *Nimmings* closes was in the testator, but after the deeds executed that term was in a different person and on different trusts.

[*Bayley B.* The rule as to revocation of a will at law is different from that in equity, for in equity a mortgage is only held a revocation *pro tanto*. As the testator had only an equitable estate in the *Portway Hall* estate, we cannot deal with that here; and it should

(a) 6 Ves. 199.

be left to the court of equity to say whether the will was revoked *pro tanto quoad* that estate.

As to *Nimmings* there is no alteration of the testator's reversion by the assignment of the same term which has taken place.]

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LORD LYNTHURST C. B.—We are of opinion, on the first point, that the will of *W. E. Johnson* was duly executed so as to pass real estates.

On the second question in the case, as far as regards the *Portway Hall* property, the estate of the testator being merely equitable, we give no opinion on it. But as to the reversion which the testator possessed in the *Nimmings* closes, we are of opinion that the will was not revoked by the mortgages, as no alteration was worked by them in the testator's estate; for his reversion remained the same which it originally was before the will was executed; so did the term: and the subsequent assignment by the termor of the residue of that term, could not affect the interest of the reversioner.

The following certificate was afterwards sent by Mr. Baron Bayley:—

I certify that the issues within contained came on for trial before me at the sittings for *Middlesex* after *Trinity* term 1832, when I directed the jury to find a verdict for the plaintiffs on the first and second issues, subject to the opinion of the court of Exchequer as to the execution of the will of *W. E. Johnson*, the testator within named; and as to whether the said will was revoked by the deeds mentioned in the second count of the declaration. And I further certify, that the court of Exchequer, after argument, were of opinion that the will in question was duly executed, and ordered the verdict to be entered for the plaintiffs on the first

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issue; and that the court were also of opinion that the deeds above referred to did not operate as a revocation of the said will, so far as regards certain closes called *Nimmings*, being part of the property referred to by the second count of the declaration, and therefore directed the verdict to be entered for the plaintiffs on the second issue also as to those closes: but it appearing to them that the testator was entitled to an equitable estate only in the freehold mansion and lands called *Portway Hall*, being the residue of the property referred to by the second count of the declaration, the court declined giving any opinion whether the deeds operated as a revocation of the will as to that part of the testator's property, conceiving it to be a question more properly cognizable in a court of equity.

J. BAYLEY.

DOE dem. GASKELL *against* ROE.

Service of a declaration in ejectment on one of two joint tenants in possession is sufficient, if such joint-tenancy appear on the affidavit of service.

JOHN EVANS moved that the service of the notice in this case upon one of the tenants in possession should be deemed good service upon both. He cited *Doe d. Bailey v. Roe (a)*, where chief justice *Eyre* said, "I do not know that we have ever construed the rule of court so strictly as to hold that service on one of two tenants in possession may not be considered as a good service."

BAYLEY B.—The marginal note of the case you have cited is, "Service of a declaration in ejectment on one of two tenants in possession, is good service on both."

(a) 1 B. & P. 369.

But they must have been joint tenants. Does your affidavit state that these persons were joint tenants? If each is in possession of the whole, this service will do.

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Evans said his affidavit did not contain that statement.

Per Curiam.—Take a rule as to the tenant you have served, but not as to the other. If he is really a joint tenant of the premises, you will have no difficulty in getting an affidavit to that effect.

Evans having afterwards produced such an affidavit,

Rule granted.

VENNALL *against* GARNER.

THIS was an action on the case for running down the plaintiff's ship *Economy*, tried at the last *Durham* assizes before Mr. Baron *Bolland*. Verdict for the plaintiff, damages 730*l*.

In an action for running down a ship the plaintiff may recover if he was not in fault in not trying to prevent the collision; but had he been so in fault, or had both parties been in the wrong, he cannot recover.

Alexander now moved for a rule to show cause why there should not be a new trial. The declaration contained two counts, both of which alleged the collision to have taken place through the carelessness, improper conduct, and mismanagement of the defendant. The plaintiff's ship *Economy* was on her voyage in a south-east course, laden, going three or four knots: the defendant's ship *Fowey* was on her voyage on a north-north-west course, light, going seven

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or eight knots. Both were brigs of about 101 tons burden each. The defendant's ship had the wind free, the plaintiff's was hard up in the wind. The question at the trial being, which of the vessels ought to have given way to the other, the defendant's counsel admitted that the *Fowey* was wrong in not doing so, but contended that the *Economy* did not do what she ought to and might have done to get out of the way, viz. by altering her helm at a particular moment. The collision was at midnight, and it was doubtful on the evidence whether the approach of the defendant's ship could be discerned from that of the plaintiff in time to alter her helm with effect. It was not sufficient for the plaintiff to say that his vessel held its course. In *Vanderplank v. Miller (a)*, Lord Tenterden held, that if there was a want of care in the navigation of the plaintiff's ship, the plaintiff could not recover. In this case it was attempted to be made out that there was a mode in which the plaintiff's vessel might have avoided the collision, and that was not distinctly left to the jury.

BAYLEY B. (b)—That was a question for the jury. The plaintiff's ship was not in fault in steering as she did, for she had a right to expect and take it for granted that the defendant's ship, which had the wind, and might go as large as she pleased, would do that which ought to be done, and would make way. If the mischief done had been the result of the combined neglect of both parties, both are in *statu quo*, and neither could recover; or if the plaintiff's ship was in any degree in fault in not taking means to avoid the collision, he could not recover: but in this case it was

(a) 1 Moody & Malkin, 169.

(b) Lord Lyndhurst was sitting in equity.

made out to the satisfaction of the jury that the fault was wholly that of the defendant, who, having the wind, did not make way for the plaintiff's ship, as he should have done.

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The other Barons concurred.

Rule refused.

THACKRAH *against* SEYMOUR.

TRESPASS for breaking and entering plaintiff's close. The defendant pleaded the general issue, and several rights of way, one of which, setting up a public footway over the *locus in quo* by prescription, was found for him at the trial before Lord *Lyndhurst*, at the *Middlesex* sittings after last term.

The course of an ancient footway leading from one highway to another was over some old inclosures, and from thence across a few yards of waste land into the highway. The commissioners under a local act for inclosing the waste, allotted to the plaintiff that part of it over which the way ran. The act did not empower them to stop up or set out ways over old inclosures, and their award did not mention the way in question, or set out any new way in lieu of it.

It appeared that the footway in question passed from the public *Twickenham* carriage road, first over the waste of a common, then over old inclosures, and again over other waste into another public way. A local act had passed in 1813, (53 G. 3. c. clxxiv.) for inclosing lands in the parish of *Isleworth*, &c., but contained no clause for stepping ways of any kind. The award mentioned nothing about the way, either as to stopping up or setting out a new way in lieu of it. The plaintiff contended that the way was only a private one leading to his mill, situate in one of the old inclosures, and that by 41 G. 3. (U.K.) c. 109. s. 11. (the General Inclosure Act,) it was extinguished as a public way by the allotment, under the inclosure act, of the lands over which it passed, and was to be taken as part of the

Held, that sec. 11. of the General Inclosure Act, 41 G. 3. (U.K.) operate to extinguish the old way.

c. 109, did not

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lands so allotted. The defendant, on the other hand, cited sect. 8. of the same act, requiring an order of two justices before stopping up a road by commissioners of inclosure; *Harber v. Rand* (a), and *Logan v. Burton* (b). The learned judge was of opinion that the right of way had not been extinguished, and defendant had a verdict as above.

Jervis (*Ashmore* with him) moved for a new trial. *Harber v. Rand* and *Logan v. Burton* are inapplicable, because in both those cases the inclosure commissioners had power by the local acts to stop up the ways in question; and section 8. of the General Inclosure Act only applies where such a power is vested in the commissioners. No such power here exists, therefore the operation of the local act as to stopping roads is left to the General Inclosure Act, sects. 8 and 11; and *White v. Reeves* (c) is in point. There an allotment had been made to the plaintiff by a commissioner under an inclosure act, of land over which the defendants previously possessed a private right of way. The local act contained no clause empowering the commissioner to stop up or set out ways, and the way in question was not noticed among those set out by him under sections 9 and 10 of the General Inclosure Act, nor was any other set out in lieu of it. It was held that sect. 11 of the General Inclosure Act applied, and that the plaintiff might stop up the way.

[*Lord Lyndhurst* C. B. This appeared in evidence to be a public footway passing from one carriage road to another. Its course was first over a common, then, for the greater part of the distance, over inclosures, from the last of which the passenger came out at a gate and went across a few yards of green sward, part

(a) 9 Prt. 38, (1821.)

(b) 5 B. & Cr. 513, (1826.)

(c) 2 B. M. 23.

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of a common, till he arrived at the highway. The object of the motion is to annihilate the way leading over the old inclosures. Then try it thus: Suppose a person had a house in the fields at the end of this pathway, the greater part of it passing over intermediate old inclosures and a few yards over the common, is his way to be annihilated by the allotment of the common? *Bayley B.* The inclosure commissioners have no power of themselves to stop up ways, and say nothing about this way: it is entire, and leads partly over common and partly over old inclosures—can it be extinguished by the operation of sect. 11. which contemplates ways over the lands to be divided and allotted? (a)]

The court considered the clauses, and

Lord LYNTHURST C. B. afterwards delivered judgment.—The point in this case turned on the question, whether or not a public footway was stopped by the operation of a local inclosure act. The description of the way was this: its course ran partly over ancient inclosures and partly over waste land into a public highway; an old inclosure act had passed applicable to the waste land, and the commissioners who allotted it had not set out any new way over this part of it. The question therefore is, was that part of the old way which passed over the old inclosures extinguished? For if it was, the whole way, as well over the old inclosures as the waste itself, would be at an end. Now by sect. 8. of the General Inclosure Act, 41 G. 3. (U.K.) c. 109. the commissioners appointed under local inclosure acts have power to stop up and divert public ways over lands to be inclosed; but that section contains a proviso, that where such commissioners have power, under any inclosure act, to stop up any old or accustomed road leading through old in-

(a) See section 8.

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closures, they shall not exercise that power without the concurrence of two justices of the peace. Here no such power was given to the commissioners by the particular inclosure act; and it was argued that the proviso I have mentioned had therefore no application to the present case. But it is impossible to take this proviso in connection with the rest of the section in the General Inclosure Act, and to suppose that the commissioners have power to stop up roads over old inclosures, unless such a power had been expressly given them; because, where such a power is conferred, it can only be exercised with the consent of two justices (a). It follows as a necessary consequence from the proviso taken with the rest of the clause, that if no such power is given to commissioners by the particular inclosure act it cannot exist at all, or if it could, could it be exercised by them only. Now the nature of the way in question was this: it was a way leading partly over old inclosures and partly over waste lands. No power was given by the local act to stop up that part of it which leads over the old inclosures; notwithstanding which, if the part over the waste was stopped up, the other part over the old inclosures would be in effect closed. Therefore as the local act did not empower the commissioners to stop up the way over the old inclosures, and as they have not set out any way over the waste lands, we are of opinion that the old way exists as it did before the local inclosure act, and unaffected by it, and that it leads partly over the old inclosures and partly over the waste lands into the public highway, as it formerly did. There is therefore no ground for granting any rule.

Rule refused (b).

(a) And see *Logan v. Burton*, 5 B. & Cr. 513.

(b) See *Simpson v. Louthwaite*, 3 Bar. & Adol. 226.

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DEBT on bond. On oyer it appeared that the bond was from one *George Tugwell*, a collector for the liberty of *Old Street*, in the division of *Finsbury*, nominated and appointed by the commissioners acting for the parish of *St. Luke*, in the division of *Finsbury* in the county of *Middlesex*, in the execution of the acts relating to assessed taxes (a), and the defendant and one *James Foster*, as his sureties to the plaintiffs, being two of the commissioners acting in the execution of the said acts for that division. The condition (after reciting that *Tugwell* had been duly appointed collector, and that one of the duplicates of assessments had been delivered and given in charge to him) was as follows: that if the said *G. Tugwell*, *J. Heeley*, and *J. Foster*, or either of them (b), should duly pay, in pursuance of the directions of the said statutes, all such sum or sums of money assessed in and to be collected in the said liberty by the said *G. Tugwell*, as such collector as aforesaid; and if the said *G. Tugwell* should duly, in pursuance of the said acts, demand the sums assessed of the respective persons from whom the same were payable, and in case of nonpayment should duly enforce the powers of the said acts against such who should make default, the bond should be void.

To this the defendant pleaded *non est factum*, and three other pleas, unnecessary to be here mentioned.

The fifth plea (c) stated, that although divers sums of

Action against a surety on a bond given by a collector of assessed taxes, and the defendant as his surety:—Held, on demurrer, that it is no defence to plead that the commissioners and receiver-general had not complied with certain directory parts of the statutes relating to assessed taxes, which lay down methods for obtaining payment from collectors.

In order to take advantage of the proviso in 43 G. 3. c. 99. s. 13., that no bond shall be put in suit against a surety for a collector for any deficiency "other than shall remain unsatisfied after sale of lands, &c. of such collector," the plea must aver that there were lands, &c. of the collector which might have been seized and sold to supply the deficiency.

(a) See the acts, Tyrwhitt and Tyndale's Digest of the Statutes, and Supplement, tit. Taxes Assessed.

(b) A bond under 43 G. 3. c. 99. s. 13., though by one surety only, is not therefore void; for that clause is merely directory. *Peppin v. Cooper*, 2 Bar. & Ad. 421.

(c) Founded on 43 G. 3. c. 99. s. 39.

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money, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, had been collected and paid to the said *G. Tugwell*, as such collector as aforesaid, of the duties given to him in charge as aforesaid; and although the said sum of money so collected and paid to the said *G. Tugwell*, as such collector as aforesaid, was heretofore, to wit, on 1 *November* 1830, in arrear and unpaid, to wit, at &c., yet the said commissioners appointed to put in execution the act of parliament made and passed in the 43d year of the reign of his late majesty king *Geo. 3.* intituled, "An act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," or any two or more of them acting for the parish of *St. Luke*, in the division of *Finsbury*, in the county of *Middlesex*, being the liberty and division for which the said *G. Tugwell* was so nominated and appointed to act as such collector as aforesaid, did not nor would twice in a year, that is to say, on the 1st day of *November* 1830, and the 1st day of *May* 1831, call before them the said *G. Tugwell*, so being such collector as aforesaid, and examine him upon oath or solemn affirmation, and assure themselves of the sum or sums of money that had been collected and paid to the said *G. Tugwell* as such collector, and the said duties so given to him in charge as aforesaid, nor did nor would they the said commissioners, nor any two or more of them, assure themselves of the sum or sums in arrear as aforesaid, and the cause or causes thereof, or examine the said *G. Tugwell*, so being such collector as aforesaid, upon oath or affirmation, touching the due payment over of certain sums of money, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, collected by him in the preceding part of the said year 1830, but the said

commissioners then and there wholly neglected and refused so to do, and wrongfully and injuriously neglected to observe and perform the requisites and duties imposed upon them by the said statute in that case made and provided; and by means of the said several last-mentioned premises he the said defendant lost and was deprived of the benefit and protection provided by the said statute for and on the behalf of persons who, after the passing of the said statute, might become sureties for the conduct of a collector of the said duties so given to him the said *G. Tugwell* in charge as aforesaid.

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The sixth plea (a) stated, that although a large sum of money, to wit, the sum of 1000*l.*, did, during the year ending on the 5th day of *April* 1831, come to the hands of the said *G. Tugwell* as such collector as aforesaid, which said sum of money ought, before the expiration of the said year, to have been paid by him the said *G. Tugwell*, as directed by the statute in such case made and provided; yet the receiver-general of the said taxes, rates and duties, of the said county of *Middlesex*, did not nor would call upon and hasten the said *G. Tugwell* to make payment of the same upon the days and at the times appointed for the payment thereof by the said statute in that case made and provided; nor did nor would the said receiver-general cause the same to be levied, by warrant under the hands and seals of two or more of the said commissioners, upon the said *G. Tugwell*, as directed by the statute in such case made and provided, but on the contrary thereof the said receiver-general then and there wholly neglected and refused so to do.

The seventh plea (b) stated, that although the said *G. Tugwell* did, during the year ending the 5th day of

(a) Founded on 43 G. 3. c. 99. s. 49.

(b) See 43 G. 3. c. 99. ss. 13. & 52.

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April 1831, receive a large sum of money, to wit, the sum of 1000*l.* as such collector as aforesaid, and although he the said *G. Tugwell* did afterwards, to wit &c., when requested to pay the said sum of money so received by him as such collector as aforesaid, as directed by the statute in that case made and provided, wholly neglect and refuse to pay the same; yet the said commissioners appointed to put into execution the said act of parliament made and passed in the 43d year of the reign of his late majesty king *George* the Third, intituled, "An act for consolidating certain of the provisions contained in an act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," or any two or more of them acting in and for the parish of *St. Luke*, in the division of *Finsbury*, in the said county of *Middlesex*, being the liberty and division for which the said *G. Tugwell* was so appointed to act as such collector as aforesaid, did not nor would imprison the person or seize the estate, either real or personal, of the said *G. Tugwell* to him belonging, but on the contrary thereof wholly neglected and refused so to do, and wrongfully and injuriously neglected to observe and perform the requisites and duties imposed upon them by the said statute in that case made and provided, and by means (as in fifth plea).


Eighth plea (a).—That the commissioners appointed to put in execution the said act of parliament made and passed in the 43d year of the reign of his late majesty king *George* the Third, intituled, (as in fifth plea,) or any two or more of them acting in and for the parish of *St. Luke*, in the division of *Finsbury*, and in the county of *Middlesex*, being the liberty and division for which the said *G. Tugwell* was so appointed to act as such collector as aforesaid, did not nor would deliver,

(a) See 43 G. 3. c. 99. s. 19.

or cause to be delivered, one of the duplicates of the assessments allowed by the said commissioners appointed to put in execution the said act of parliament, or any two or more of them, together with warrants, under the hands and seals of two or more of the said commissioners, for collecting the same, unto the respective persons by them nominated to be collectors under and by virtue of the said statute.


Ninth plea (a).—That the said receiver-general of the said taxes, rates and duties of the said county of *Middlesex*, did not nor would, nor did nor would his deputy or deputies authorized under the statute in that case made and provided, at the respective times appointed by the statute in that case made and provided for the delivery of schedules of defaulters, administer an oath or solemn affirmation to the said *G. Tugwell*, so being such collector as aforesaid, that he had fully paid all the sums by him collected or received of or for the assessed taxes, and had fully accounted for all sums not collected or received in the schedule or schedules previously delivered by him the said *G. Tugwell* as such collector as aforesaid, but then and there wholly neglected and refused so to do.

Tenth plea (b).—That although the said *G. Tugwell* did, whilst he was such collector as aforesaid, reside within ten miles of an office for the daily or weekly receipt of the taxes, established pursuant to a certain act of parliament made and passed in the third year of the reign of our late sovereign lord *George* the Fourth, intituled, "An act to amend the laws relating to the land and assessed taxes, and to regulate the appointment of receivers-general in *England* and *Wales*:" and although divers monies of the said taxes, amounting in the whole to a large sum of money, to wit, the sum of

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(a) See 3 G. 4. c. 88. s. 2., No. 2, Rule 1.

(b) See 3 G. 4. c. 88. s. 2., No. 2, Rule 2.

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1000l., had been previously received by the said *G. Tugwell* as such collector as aforesaid, the accounts whereof had not been previously examined by the said commissioners of the said district for which the said *G. Tugwell* had been so appointed such collector as aforesaid, yet the receiver-general of the district where the said office was so situate as aforesaid did not nor would require the said *G. Tugwell*, so being such collector as aforesaid, to account with him the said receiver-general for the said sums of money so received by the said *G. Tugwell* as such collector as aforesaid; nor did nor would he the said receiver-general require the said *G. Tugwell*, so being such collector as aforesaid, to be examined on his oath or affirmation touching the sums so collected as aforesaid, but on the contrary thereof the said receiver-general then and there wholly neglected and refused so to do.


Eleventh plea (a).—That the said *G. Tugwell* was not duly nominated to act as a collector by the commissioners appointed for putting in execution the said act of parliament made and passed in the 43d year of the reign of his late majesty king *George* the Third, intituled, (as in the fifth plea,) as in the condition of the said writing obligatory mentioned.

Twelfth plea (b).—That although the commissioners appointed to put in execution the said act of parliament made and passed in the 43d year of the reign of his late majesty king *George* the Third, intituled, (as in the fifth plea,) had received notice, as directed by the statute in such case made and provided, of a receipt to be holden by the receiver-general of the monies collected and received within the limits of the district of the said commissioners; yet the said commissioners did not nor would, on or immediately before the day of

(a) See 43 G. 3. c. 99. s. 12.

(b) See 3 G. 4. c. 88. s. 2, No. 4, Rule 1.

such receipt to be so holden as aforesaid, call before them the said *G. Tugwell*, so being such collector as aforesaid, and examine him upon solemn oath or affirmation, and assure themselves of all and every of the sum or sums of money and arrears of the said duties and compositions respectively that had been collected or remained to be collected, and which were payable to the said receiver-general or his deputy, or such other person or persons authorized to receive the same at such ensuing receipt, under the statute in that case made and provided; nor did nor would they the said commissioners make any order therein for the payment of the same to the receiver-general or his deputy, or any other person or persons authorized to receive the same as aforesaid, but on the contrary thereof they the said commissioners wholly neglected and refused so to do.

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General demurrer to the above pleas and joinder.

Follett in support of the demurrer. The plaintiffs sue as commissioners of taxes, on a bond given by the defendant as surety for the due performance by *Tugwell* of his duty as a collector of taxes. Pleas of this nature are often hazarded in actions similar on bonds, with the object of relieving the sureties from liability, by showing that the commissioners and receiver-general have not strictly performed those directory parts of the statute which they are empowered to put in force. But the condition has nothing to do with the previous execution of duty by the commissioners, and is forfeited by the neglect of duty of the collector. [Lord *Lyndhurst* C. B. The duty which is imposed on the commissioners by 43 G. 3. c. 99. s. 39., relied on in the first (a) of the pleas here demurred to, is merely intended to

(a) *Viz.* the fifth.

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enable them to ascertain with accuracy the sum in the collector's hands; but can their neglect of that duty make the crown a sufferer by precluding them from recovering under sec. 13. on the bond given to secure the faithful performance of duty by the collector? *Bayley B.* Had the collector done *his* duty in paying over the sums received, the sureties never would have been prejudiced.] Every plea, except the 7th, rests on directory enactments, only inserted to enable the commissioners to ascertain the amount in the hands of the collector. Now the *Trent Navigation Company v. Harley (a)* shows that negligence on the part of obligees does not exonerate the surety. There the bond was conditioned for a collector of tolls (the principal obligor) to account for and pay over from time to time all such sums as should come to his hands as such collector; and the laches of the obligees in not properly examining his accounts for eight or nine years, and not calling on him for payment, so soon as they might have done, for sums in arrear, was held no estoppel at law (*b*) in an action against the sureties. Again, in *Nares v. Rowley (c)* it was held, that a similar bond by a collector under 43 G. 3. c. 122., for payment of taxes to the receiver-general, could be put in force against one of the sureties, though he was not apprized of the default of the principal obligor, the collector, in not paying over duties collected by him, nor called upon for indemnity by the commissioners till after his dismissal from office.

The seventh plea is not founded on the proviso in sec. 13. of 43 G. 3. c. 99., which is framed for the benefit of the surety, but on sec. 52., which is not. For that sec-

(a) 10 East, 34.

(b) And see *O'Kelly v. Sparkes*, in error, 10 East, 369. See per *Gibbs C. J.* in *Orme v. Young*, Holt's C. N. P. 84 and 399; *Rees v. Berrington*, 2 Vcs. jun. 540; *Wright v. Simpson*, 6 Vcs. 734.

(c) 14 East, 510.

tion authorizes and empowers the commissioners to imprison the person and seize and secure the estate of the collector, and is framed to protect the revenue against *his* default; whereas the proviso in section 13 might have applied, viz. "That no such bond shall be put in suit against any surety or sureties, for any deficiency, other than what shall remain unsatisfied after the sale of the lands, tenements, goods and chattels of the collector." But to bring this surety within that proviso, he should have alleged in pleading, and proved the existence of some lands or tenements of the principal, in a shape applicable to the payment of the arrears sought to be recovered by seizure and sale. The fifth, sixth, ninth, tenth, and twelfth pleas proceed on the directions contained in the act for enforcing the performance of their duty by the commissioners and collectors, and assume that, because the crown has not proceeded against those persons for neglect, it cannot so proceed against the present defendant, the surety, and must suffer accordingly.


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The eighth plea is subject to the same observations; and to another, that the defendant is estopped from disputing that fact by the recital in the condition of the bond.

The eleventh plea is, that *Tugwell* was not duly appointed collector, and the defendant is estopped in like manner, for he cannot plead against his own deed.

Bompas Serjt. contra, admitted that the eighth and eleventh pleas could not be maintained, being contrary to the condition of the bond. The seventh plea may be amended by inserting an averment under sec. 13. that there were lands, tenements, &c. of the collector unsold. [Lord *Lyndhurst* C.B. The court cannot suffer that to be done without seeing by an affidavit

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that such was the fact. Nothing sufficiently establishing it appears on these pleas.] But the pleas of the other class are good: for if the clauses relied on in them are not to afford protection to sureties, the facility of obtaining such security will be diminished. Now the public are interested in the procuring good sureties. [*Bayley* B. It is for the protection of the public that the collector should get sureties; for if the taxes were lost they must be paid over again.] The law of principal and surety is the same, whether the principal has contracted with government officers or private persons; and it is a different question whether the former, as public officers, would be liable to any remedy, criminal or civil, for a breach of duty. The condition, by referring to "the said statutes," embodies them in itself, and the surety is entitled to the protection of any section in them which operates for his benefit, whether it was inserted with that object or not. Then he in fact contracts, that if the directions of the statutes referred to in the condition are complied with, he will be answerable. [Lord *Lyndhurst* C.B. Is not the collector bound to pay to the receiver-general, though not examined on oath by the commissioners? (a) *Bayley* B. In general, in an action on a bond, the defendant pleads performance of the condition. Then the condition is duly to pay all sums of money collected, and, if not paid, to take steps for enforcing the payment; viz. to demand all sums assessed. This defendant does not say that either thing has been done, but relies on being excused from doing either.]

The directions of the statutes to the commissioners, being referred to by this condition, form part of the contract, and their neglect to perform things so directed excuses the surety. Under section 39 it is the condition of his liability that they shall call up the collector

(a) See 43 G. 3. c. 99. s. 39., and 3 G. 4. c. 88. No. 2, Rule 1.

twice a year to examine him on oath, and assure themselves of the sums that had been collected and paid to him, and to make order for payment of the same to the receiver-general. [*Bayley* B. Assuming that to be so, performance up to a given period should have been pleaded (*a*), viz. up to 28th *August*, when the bond was executed, and to the 1st *November*, when the commissioners ought to have called up the collector. Suppose that in the intermediate period between *August* and *November* he had been guilty of neglect in not demanding the taxes, the bond would have been immediately forfeited. Would the surety have been exonerated for his neglect to demand by the default of the commissioners to call in the collector on 1st *November*? The defendant might have pleaded performance either of the whole, or an excuse for performance of the whole, or he might have alleged performance of part with an excuse for not performing the residue. Here the pleas are to the whole bond. They might have alleged performance by *Tugwell* as to every thing from the 28th *August* to the 1st of *November*, and then have stated the neglect of the commissioners as an excuse for the subsequent non-performance. Lord *Lyndhurst* C. B. It would be perfectly consistent with these pleas that there should have been a breach of the condition before any circumstance of neglect by the commissioners could apply. In no view of these pleas does the neglect of the commissioners to comply with the directions of the act afford any answer to the action.]

The 9th plea turns on 3 G. 4. c. 88. s. 2, No. 2, Rule 1. By No. 1, Rule 7 (*b*), the collector is not bound to pay before the receipt days, and the receiver-general is by No. 2, Rule 1, to examine him on oath. The last plea is, that the commissioners did not call the collector

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(*a*) See *Serra v. Wright*, 6 Taunt. 45. (*b*) And see No. 2, Rule 2.

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before them and require him to pay, that is, on No. 4, Rule 1. [Lord *Lyndhurst* C. B. But default to demand might have been committed before they could call the collector before them.] By 3 G. 4. c. 88. s. 2, No. 4, Rule 1, the commissioners are required, on receiving notice of any receipt to be held by the receiver-general of the monies collected within their jurisdiction, on or before the receipt day so to be holden, to call before them the collectors, and examine them on oath as to all sums and arrears of duties and compositions that shall have been collected, and make order for payment of the same to the receiver-general. The collector cannot be said to be in default till he is called before the commissioners. [*Bayley* B. Before 3 G. 4. c. 88. was not the collector under an obligation to pay to the receiver-general under sections 48 49 & 50 of 43 G. 3. c. 99., whether called before the commissioners or not? Next, by 3 G. 4. c. 88. s. 2, No. 3, Rule 1, the collector is to be prepared either to produce to the receiver-general the duplicates of assessment showing what he has received, or, "instead thereof," a certificate from the commissioners of the sums collected and to be paid at the ensuing receipt.] That act contains no statement that he is to pay over directly to the receiver-general, except by order of the commissioners; if he can, then the intended check of the commissioners is lost.

Lord *LYNDHURST* C. B.—The second Rule of 3 G. 4. c. 88. No. 2, directs that every collector residing within ten miles of an office for the daily or weekly receipt of taxes, shall once in every intervening quarter, when required by the receiver-general of the district, *account* with and be examined on oath by him, "*unless* the accounts of the taxes received by such collector shall have been previously examined by the commissioners of the district, and the amount to be then paid to the receiver-

general shall have been certified under their hands, and the certificate thereof delivered to the said receiver-general, as directed by that act (a)." It is quite clear that it is not necessary that the collector should in all cases attend and be examined before the commissioners, or their certificate of the amount to be then paid to the receiver-general would not have been stated in the alternative. In the one case the collector must produce a certificate, in the other he must pay over to the receiver-general; for though the *accounting* with him may be only the fixing the amount to be paid, that term must include the subsequent receipt of the balance due. For what other purpose does the receiver-general attend, than to receive payments from the collectors? He is not required to do any act, but is to be attended by the collector who is to account before him. If the result of the accounting is, that a sum is due, that sum must be paid over.

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BAYLEY B.—The receiver-general attends to receive; the collector to account; then must not the latter pay over any thing which is found due? It is the duty of the collector, not of the receiver-general, to procure the certificate of the commissioners.

Leave was afterwards given to amend the seventh plea in the manner proposed.

(a) Vis. by 3 G. 4. c. 88, No. III. Rule 1.

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A writ of inquiry having been executed, and a defendant taken in execution in vacation under 1 *W. 4. c. 7. s. 1.*, the plaintiff's attorney should file the inquisition and subsequent proceedings, or suffer them to be copied, in order to give the defendant an opportunity of inspecting them, in order to see if any ground exists for arresting the judgment under s. 4.

Where a defendant agreed to pay the plaintiff the sum of 25*l.* in full for his share of the costs of a lease to the defendant, to be procured for him by the plaintiff, and to be prepared by his solicitor, and of an agreement for so procuring it:—Held, that the declaration was sustainable without any allegation that costs had been incurred, or of their amount, or that notice had been given thereof to the defendant.

ASSUMPSIT on an agreement. The first count stated, that by agreement between the plaintiff, (described therein as a receiver appointed by the court of Chancery,) and the defendant, the plaintiff agreed with the defendant to procure to be granted to him a good lease of certain premises, for a term and at a rent mentioned, and the defendant agreed with plaintiff to accept such lease and to execute a counterpart thereof, and to pay to the plaintiff on request the sum of 25*l.* in full for his proportion of the costs and expenses of preparing and executing that agreement, or in relation thereto, such lease and counterpart to be prepared by the said plaintiff's solicitor. Averment, that the plaintiff procured such lease to be granted to the defendant, and that it was prepared by the plaintiff's solicitor, and that although the defendant did accept the lease, and did execute a counterpart thereof*, yet that defendant, though requested to pay the said sum of 25*l.* in full for his proportion of the costs and expenses aforesaid, did not nor would pay the same.

The second count was like the first to the asterisk, and then alleged the payment by the plaintiff of several specified sums for particular items of costs incurred in relation to the agreement, in all amounting to 50*l.*, and then stated nonpayment by defendant. Judgment by default. On writ of inquiry executed before the sheriff, the plaintiff had a verdict for 25*l.*, and judgment being signed thereon in vacation (1 *W. 4. c. 7. s. 1.*) the defendant was taken under a *ca. sa.*

On affidavit of the above facts, and that notice had been given to the plaintiff's attorney to produce and

that costs had been incurred, or of their amount, or that notice had been given thereof to the defendant.

file the writ of inquiry, and subsequent proceedings in court, a rule was granted to show cause why they should not be filed by the plaintiff's attorney in the exchequer office, in order to their being read on a subsequent motion to vacate the judgment, with costs to be paid by plaintiff's attorney.

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Alexander showed for cause, that it was not usual in practice to file inquisitions taken on writs of inquiry, but to deliver them to the plaintiff's attorney, and submitted that filing them was not necessary to the proposed motion. Costs ought not to be inflicted, for no copy was applied for by the defendant.

LORD LYNTHURST C. B.—The officer of the court informs us, that a file in fact exists, on which inquisitions and all subsequent proceedings thereon are filed, and that a fee for so filing them is always charged by and allowed to a plaintiff's attorney.

Then the defendant's attorney was entitled to have the inquisition and proceedings filed by the plaintiff's attorney at all events, and has a right to inspect them when so filed; but here the plaintiff's attorney not only refused to file them when called upon to do so, but did not give a copy to the defendant's attorney, or allow him to look at them.

BAYLEY B.—The defendant has a right to see the inquisition and proceedings thereon, to judge whether there is any thing on the face of them, for which the judgment may be arrested. When the plaintiff's attorney was called on to file them, he should have shown them, or offered to suffer a copy to be taken.

Rule absolute with costs as moved.

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The inquisition, &c. being filed accordingly, showed the declaration to be as above stated. *Mansel* produced the rule, and moved to vacate the judgment and enter an arrest of it, pursuant to 1 *W. 4. c. 7. s. 4.* As the declaration contains no allegation that expenses amounting to a sum stated had been incurred by the plaintiff, or that they were necessarily incurred, the jury had no power to give damages upon it. Nor is it averred that the defendant had notice of such expenses having been incurred; that is necessary, as the preparing the documents was an act to be done by a third party unknown to the defendant, *viz.* the plaintiff's solicitor. *Foxe v. Goodson*(a) shows that it would be a good ground of demurrer to a declaration on a promise to assign a lease and pay costs of suit, that it did not state what costs were expended by the plaintiff, though the defect might be cured by verdict.

BAYLEY B.(b)—That case is quite distinguishable from the present. There the party undertook to pay the costs generally and indefinitely, they not being ascertained at the time of the promise. It was, therefore, necessary that they should be ascertained before action brought to recover them; and as the declaration contained no allegation that they ever were so ascertained, it was bad on demurrer. In the present case a lease was about to be procured and executed according to agreement. It was foreseen that expenses would be necessarily incurred; nevertheless the lessee, the defendant, stipulated to be only liable to a certain extent, as the lease was to be prepared by the attorney for the lessor. To that extent then he is liable; for this is not an undertaking to pay an amount uncertain at the time, and to be thereafter ascertained, but a promise to pay 25*l.* in full, in respect of an uncertain

(a) *Cro. Eliz.* 376.

(b) Lord *Lyndhurst* was sitting in equity.

amount of costs, which must be incurred in the natural course of the transaction contemplated. Then the sum of 25*l.* was a liquidated amount ascertained between the parties, and there is no ground for vacating or arresting the judgment.

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BOLLAND B.—The argument founded on the want of an allegation that expenses to a stated amount were incurred, is answered by this, that it clearly appears from the declaration that expenses were incurred, and that the defendant expressly agreed to pay 25*l.* for his liquidated share of the amount of them.

GURNEY B. concurred; and the rule was

Refused.

HUCKER v. GORDON.

CASE. First count stated, that plaintiff on 1st Nov.

1830, in a certain close of the plaintiff, situate &c. at *Ilchester*, in the county of *Somerset*, took and distrained the cattle, goods, and chattels, to wit, thirty ewe sheep of one *J. F. Reeves*, of the value of 50*l.* and in the said close of the said plaintiff then and there being and doing damage there to the said plaintiff as a distress for the said damage. And the said plaintiff then and there led and drove the same out of the said close to a certain common pound in the parish in which the said close of the plaintiff was situate, and then and there impounded the same, and kept the same impounded for a long space of time for the

A sheriff may take one pledge in replevin for distraining cattle damage feasant.

A count stating that the sheriff, instead of taking a bond from the plaintiff in replevin, and two sufficient sureties, took a bond from the plaintiff in replevin and one surety, who was al-

leged to be insufficient, is bad, for not alleging that the plaintiff in replevin was insufficient.

A declaration against a sheriff for taking insufficient pledges in replevin, should show that a writ of *retorno habendo* had been issued, and *elongata* returned thereon.

A count against a sheriff for not restoring the goods is bad, for his duty, under stat. 13 *Ed. 1. West. Sec.*, c. 2. is only to take pledges for that object.

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cause aforesaid, according to the laws and customs of the realm, until the defendant, then being sheriff of the said county of S. afterwards, to wit, on &c. and within his bailiwick as such sheriff, that is to say, at &c. aforesaid, on the complaint of the said *J. F. Reeves* made to him the defendant, so then being such sheriff, against the plaintiff in that behalf, and under colour of his office of sheriff as aforesaid, caused the said cattle, goods, and chattels to be replevied and delivered to the said *J. F. R.*, and then and there made deliverance of the said distress to the said *J. F. R.*, to wit, at &c. Averment, that at the then next county court of the said sheriff, to wit, in the county court of the said sheriff, holden at *I.* aforesaid, in the said county of *S.*, in and for the county of *S.* aforesaid, before the then suitors of the said court, to wit, *J. Denn* and *R. Fenn*, the said *J. F. R.* did appear, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said plaintiff for wrongfully taking and unjustly detaining the said cattle, goods and chattels, and afterwards, to wit, on &c., at &c., the plaintiff did duly appear in and before the said court to answer the said *J. F. R.* in the plea of his said plaint, and such proceedings was thereupon had in the said plea that afterwards, to wit, at the next county court of the defendant as such sheriff as aforesaid, holden &c. (as before), before the then suitors of the said court, the said *J. F. R.* did not duly prosecute his suit, and it was then and there duly considered in and by the said last-mentioned court, that the said *J. F. R.* should take nothing by his said plaint, but that he and his pledges to prosecute should be in mercy &c., and that the said plaintiff should have a return of the said cattle, goods and chattels, as by the said remembrance and proceedings thereof still remaining in the said

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court more fully and at large appears; and although it was the duty of the said defendant as such sheriff as aforesaid, before his making deliverance of the said distress to the said *J. F. R.* as aforesaid, in pursuance of the statute in such case made and provided, to take from the said *J. F. R.* and two responsible persons as sureties, a bond in double the value of the said cattle, &c. so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said *J. F. R.* for the taking of the said cattle, &c. with effect and without delay, and for duly returning the cattle, &c. so distrained, in case a return should be awarded: Nevertheless the defendant so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, &c. to injure the plaintiff, and to deprive him of the benefit of the said distress, and of the means of obtaining satisfaction for the said damage, did not nor would, before his making deliverance of the said distress to the said *J. F. R.* as aforesaid, take from the said *J. F. R.* and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do, to wit, at &c. And the said plaintiff further avers, that he hath not as yet obtained a return of the cattle, goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and the said damage and every part thereof is still wholly unsatisfied to the plaintiff, nor hath *J. F. R.* hitherto answered to the said plaintiff for the value of the said cattle, &c. so distrained as aforesaid, or any or either of them, or any part thereof, and by reason of the premises the plaintiff hath been and is wholly deprived of the said cattle, &c. so distrained as aforesaid, and of the benefit of the said distress, and of the means of satisfying the said

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damage, and his costs and charges by him expended in and about the endeavouring to obtain satisfaction thereof, and a return of the said cattle, to wit, at &c.

The second count was nearly similar, omitting the statement of impounding, and of *J. F. R.* appearing and levying a plaint, substituting a general statement that he did not appear and prosecute with effect his suit before then commenced.

The third count, after proceeding as in the first count, to aver the sheriff's duty and the inducement to the breach as in that count, proceeded thus: that the defendant so being, &c. (as in the inducement to the breach in the first count,) did not nor would, before the making deliverance of the said last-mentioned distress to the said *J. F. R.* as aforesaid, take from the said *J. F. R.* and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully, injuriously, and wholly omitted and neglected so to do, and, on the contrary thereof, he the said defendant wrongfully and unjustly, before the replevying and delivery of the said last-mentioned cattle, &c. on &c. at &c. did take, in the name of him the defendant, as such sheriff as aforesaid, of the said *J. F. R.* and one or other person, to wit, *R. J.*, a certain bond, conditioned for the prosecuting the said suit of the said *J. F. R.* with effect and without delay, for duly returning the said last-mentioned cattle, &c. so distrained as aforesaid, in case a return thereof should be awarded as on a bond, taken in pursuance of the said statute; nevertheless plaintiff saith, that the said *R. J.* so taken as surety as aforesaid, at the time of his becoming pledge and surety in that behalf as aforesaid, was not a good, able, and sufficient or responsible surety for the prosecuting the said suit with effect and without delay, or for duly returning

the said cattle, &c. so distrained as aforesaid, in case a return thereof should be adjudged, but the said *R. J.* at the time of his becoming such surety as aforesaid, was and ever since hath been, and still is, wholly insufficient for that purpose, nor have the said last-mentioned cattle, &c. or any &c. as yet been returned to the said plaintiff, nor have the said last-mentioned damage, or any part thereof, been as yet satisfied to plaintiff (as in first count to end).

The fourth count was like the first, as far as stating the judgment of the county court for a return of the cattle, &c.; it then proceeded,—and although it was the duty of the defendant as such sheriff as aforesaid, before his making deliverance of the said last-mentioned distress to the said *J. F. R.* as aforesaid, in pursuance of the statute &c., to take from the said *J. F. R.* pledges for the pursuing of the said suit, and for duly returning the said cattle, &c. in a certain bond conditioned for the pursuing the said suit, and for duly returning the said cattle, &c.: and although he the said defendant, before the replevying and delivery of the said last-mentioned cattle, &c. as aforesaid, on &c. at &c., did take in the name of him the said defendant as such sheriff as aforesaid of *J. F. R.* and a certain other person, to wit, one *R. J.*, a certain bond conditioned for the pursuing of the said suit, and for duly returning the said last-mentioned cattle, &c. in case a return should be awarded; and although the said *J. F. R.* did not make a return of the said last-mentioned cattle, &c. or any part thereof, according to the form and effect of the condition of the said writing obligatory, but hitherto wholly neglected and refused so to do, to wit, at &c. whereby the said writing obligatory became forfeited to the said plaintiff, so being sheriff of the said county of S.: And the plaintiff further avers, that the said plaintiff did afterwards, to

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wit, on &c. at &c. request the defendant to assign the benefit of the said writing obligatory to him the plaintiff in the said action, and permit him the plaintiff to sue thereupon in the name of him the said plaintiff, and for his the said plaintiff's own use and benefit; and although the plaintiff was then and there willing, and then and there offered to pay to the defendant the costs payable to him the defendant in that behalf, yet the defendant so being such sheriff as aforesaid, not regarding the duty of his said office as such sheriff, nor the statute in such case made and provided, but contriving, &c. to injure the plaintiff in this behalf, and to hinder him from bringing any action or actions on the said writing obligatory, and to deprive him of the means of recovering the damages aforesaid, did not nor would, at the said time when he was so requested, assign to the plaintiff, as the defendant in the said action, the benefit of the said writing obligatory, and permit him the said plaintiff to sue thereupon, in the name of him the said plaintiff, and for his the said plaintiff's use and benefit, but on the contrary thereof wholly refused so to do; and by means of the premises plaintiff hath been and is hindered from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of the recovery of said damages, and of obtaining a return of the said last-mentioned cattle, &c., to wit, at &c.

The fifth count followed the first count, as far as stating the judgment in the county court, for a return of the cattle, &c. and then alleged that the defendant, not regarding &c., did not, nor would nor did any of his bailiffs, after the said award of the said return of the said last-mentioned cattle, &c. restore the same to the plaintiff, but on the contrary thereof plaintiff avers that he hath not obtained a return of the last-mentioned

cattle, &c. so distrained, and the last-mentioned damage has not been satisfied to the plaintiff, nor hath defendant nor any of his bailiffs hitherto answered the plaintiff for the price of the last-mentioned cattle, &c. so distrained, (as in first count to end.)

General demurrer to so much of the fourth count as relates to the said supposed disregard by defendant of his duty as sheriff as therein mentioned, and of the statute in such case made and provided, in that defendant did not nor would, when requested, assign to plaintiff, as defendant in the said action, the benefit of the said writing obligatory, and permit him, plaintiff, to sue thereupon in the name of plaintiff, and for his use and benefit, but on the contrary thereof refused so to do.

Pleas. To first, third, and last counts, *actio non*, because before the exhibiting the bill of plaintiff in this behalf, to wit, on &c., the said several complaints in those several counts mentioned at the instance of the said *J. F. R.* were duly removed from and out of the county court of the said sheriff of the said county into the court of our said lord the king, before the king himself, at *Westminster*, by virtue of his majesty's several writs of *recordari facias loquelam*, before then sued out and prosecuted out of the court of our said lord the king of his Chancery at *Westminster* aforesaid, returnable respectively before our said lord the king on &c., where-soever &c., and that the said *J. F. R.* before and at the time of the said several removals of the said several complaints in those counts mentioned, and from thence continually to the time of the exhibiting of the said bill of the said plaintiff in this behalf, hath duly prosecuted and still is duly prosecuting his said several suits between the said *J. F. R.* and the now plaintiff, of and in the said several takings and detainings, and that the said several suits, at the time of the exhibiting, &c. were and still are depending in the said court of our

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said lord the king &c., and not in any way ended or determined. Verification.

To second count, *actio non*, because before the exhibiting the bill of the plaintiff against defendant at the county court of the said sheriff holden at *I.* in and for the said county, and within the jurisdiction of the same court, to wit, on &c., the said *J. F. R.* did appear before the then suitors of the said court, to wit, *J. D.* and *R. F.*, the same court then being the next county court of the said sheriff holden, &c. (as in the first plea) after the replevyng and making deliverance in the said second count mentioned, and he, the said *J. F. R.* having theretofore duly levied his plaint without the writ of our said lord the king, and the same plaint having theretofore been duly entered in the same court against the said now plaintiff for the taking and detaining in that count mentioned, and that such proceedings were thereupon had in the said plea, that afterwards and before the exhibiting the said bill of the plaintiff in this behalf, to wit, on &c., the said plaint at the instance of the said *J. F. R.* was duly removed from and out of the said county court, (as in first plea to end.)

Third plea to first count, *actio non*, because before the making deliverance of the distress in that count mentioned, he defendant being then sheriff as aforesaid, according to the statute, &c. did take and receive from the said *J. F. R.* pledges for the prosecuting of the suit of the said *J. F. R.* against the now plaintiff, for the taking and detaining in that count mentioned, and also for the return of the said cattle, &c. if a return should be awarded, to wit, a certain bond as herein-after mentioned; and the said *J. F. R.* and one *R. J.* on &c., at &c., by the same bond, sealed with their respective seals, and now shown to the court here, did jointly and severally acknowledge themselves to be


held and firmly bound to the defendant, so being such sheriff, in the sum of 60*l.* with a condition thereunder written, that if *J. F. R.* did and should appear at the then next county court of the said sheriff, to be holden at *I.* in and for the said county, on day then next, and then and there prosecute with effect and without delay his suit which he had commenced against the now plaintiff, for wrongfully taking and unjustly detaining his cattle, &c. for damage feasant supposed to be committed as it was said, and did duly make a return of the said cattle, &c. if a return thereof should be adjudged by law, and likewise did and should keep harmless and indemnified the said sheriff, his county clerk, deputies, bailiffs and assistants, of, from and against all action and actions, costs and expenses, touching or in any wise concerning the replevying and delivery of the said cattle &c., then the said obligation to be void and of none effect, or else to be and remain in full force and virtue. That the said bond at the time of the taking thereof, and of the making deliverance as aforesaid, was and still is a good and sufficient pledge for the pursuing of the said suit, and for the return of the said cattle &c., according to the form of the statute, and that the said *J. F. R.* at the time of his becoming pledge and surety in that behalf as aforesaid, and of the making deliverance as aforesaid, was and still is a good, able, sufficient, and responsible surety, for the pursuing of the said suit as aforesaid, and for the said return as aforesaid, according to the form of the same statute. Verification.

The fourth plea was to the second count, and the fifth to the fifth count, and were like that lastly above stated.

Replications. To the first and second pleas precludi non, because heretofore and before the delivery of the said several writs of *re. fa. lo.* to the proper officer of

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the said county court on &c. at &c., it was duly considered in and by the said county court, that *J. F. R.* should take nothing by his said plaint, and that he and his pledges to prosecute should be in mercy, and that plaintiff should have a return of the said cattle &c. Verification.

General demurrer to those replications and joinder.

General demurrer to third, fourth, and fifth pleas and joinder.

The defendant stated the following points for argument.

That the plaintiff could not recover on the three first counts, it not being imperative on the sheriff to take a replevin bond with two sureties, on distresses for damage feasant.

That the fourth count is bad, because it is not the sheriff's duty to assign a replevin bond to the plaintiff, that he may sue on it in his own name (a).

That the last count is bad, because the sheriff is not personally liable after judgment for the avowant, where there has been no breach of duty in the sheriff.

That the sheriff is not liable for not returning the cattle, because the plaintiff has not obtained final judgment, as appears by the first and second pleas.

That the sheriff has done his duty in taking a replevin bond from *J. F. R.*, he being a sufficient surety, as appears by the third, fourth, and last pleas.

Mansel, for the plaintiff, was desired by the court to apply himself to the omission in every count of any award of a writ of *retorno habendo*, and return of *elongata* thereon.—The cattle &c. not having been returned, the sheriff is liable to return them, without that previous course of demand. [*Bayley* B. No one has been called on to return the goods by writ. Is

(a) See *Combes v. Cole*, Rep. temp. Hard. 352.

there any instance of such an action as this without that previous step? (a)] *Rouse v. Patterson* (b) first established that this action lies against the sheriff before a *sci. fa.* issued against the pledges. On the same principle a writ of *retorno habendo* is unnecessary. In *Perreau v. Bevan* (c) the want of it was held immaterial in an action against a sheriff for losing a replevin bond. [Bayley B. There the avowant elected to proceed under the statute 17 Car. 2. c. 7. s. 2., on a bond given in pursuance of 11 G. 2. c. 19. s. 23., and therefore conditioned for the plaintiff in replevin to appear at the county court and prosecute with effect, *i. e.* success. In that case the non pros below was a breach of the condition to prosecute with effect, and at once worked a forfeiture of the bond without any necessity to issue a *ret. hab.*; whereas here the avowant, proceeding at common law, would only be entitled to a judgment awarding a return. To secure that return the sheriff was directed by 13 Edw. 1. West. Sec. to take pledges; they would not be liable to a *scire facias* for not returning the goods till after *retorno habendo* issued, and a return of *elongata*—and can the sheriff be otherwise liable?]

The question is, whether the judgment of non pros was final, or equivalent to final, or not? If it is, the proceedings were improperly removed, and the pleas are bad. Now judgment had been signed, though the costs had not been taxed. *Lowfield v. Satchwell* (d) shows, that after taxation on a non pros it is too late to remove the suit: and in *Walker v. Gann* (e), *Holroyd J.* states it to be a sound general rule, that a cause should not be removed from an inferior jurisdic-

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(a) See *Evans v. Brander*, 2 H. Bla. 550.

(b) 7 Mod. 387, 4 Bac. Abr. 128.

(c) 5 B. & C. 284. And see per *Holroyd, J.* id. 290.

(d) 1 Wils. 123.

(e) 7 D. & R. 769.

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tion after judgment has been signed there, and particularly after the defendant has suffered judgment by default; *Bevan v. Prothesk* (a).

[*Bayley B.* The declaration does not directly aver, nor is it to be necessarily collected from it, that the judgment was final. That averment should have been made if the fact were so, as that would have prevented the removal of the proceedings. On the other hand the pleas allege that removal to have taken place; and the replication is merely argumentative, *viz.* that the judgment of non pros had taken place before the delivery of the *recordari facias* to the proper officer of the county court. Had the plaintiff replied that judgment was given before any removal of the plaint, that would have been a material allegation.]

The third count is good, for it states that the sheriff, instead of taking bond from *Reeves* and two sufficient sureties, took bond from him and *Jones*, a single surety, who was insufficient. Now stat. *West. Sec.* speaks of pledges in the plural. [Lord *Lyndhurst C.B.* It is laid down in *Gilbert on Distresses*, as the result of many cases, that one surety is sufficient. As to the surety's insufficiency, it is not here averred that *Reeves*, the principal and the owner of the cattle, was not alone a sufficient surety; and if he was, it has been held, that as he joined in the bond he would be a sufficient surety within the act.]

Per Curiam.—It becomes unnecessary to consider the pleas, as there is no one count of this declaration which is not open to objection in point of law, or upon which judgment can be given for the plaintiff. The sheriff is not the judge of the court below, or the person to restore the goods taken. The two first

(a) 2 Burr. 1151.

counts are answered by this, that the sheriff was not bound to take more than one pledge (a). The third count rests on the insufficiency of *Jones*, the pledge taken; but as it does not allege the insufficiency of the obligor *Reeves*, the principal, *non constat* that he was insufficient to pay. The fourth count contains no averment of the issuing a writ of *retorno habendo*, or of a return of *elongata* thereon. That objection applies to the other counts. As to the last count, for not restoring the cattle, it is not the sheriff's duty to do so; he is only to take pledges that the party shall restore them. The plaintiff in this action should, in his character of avowant below, have taken the proper means to obtain the fruit of his judgment of non pros, by suing out a *retorno habendo*.

As to the question whether the proceedings were duly removed, it should have been raised on the record as an issue, by traversing the fact of due removal; which would depend on the time when the *recordari facias* was delivered to the officer, and whether that was before or after final judgment. But without reference to the correctness of the pleas or replications, the declaration is bad, and on that ground the judgment must be for the defendant.

Judgment accordingly.

Cooling was to have argued for the defendant.

(a) And see *Peppin v. Cooper*, 2 Bar. & Ald. 421.

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DOE dem. CLARKE against CLARKE.

A testator, having first charged such part of his *property* as would be necessary to pay his debts, devised to R. C. a house, &c. "lately in the possession of G. S. of W., or his mortgagee, *the said property lying and being in the township of W.*" He also devised to R. C. "all the share, right, and *property* of the H. estate, situate," &c.

Held, that the devised premises in W. being themselves charged with the debts, and neither the devisee, nor the estate he acquired by the devise subsequent to the charge, being so charged, the devisee R. C. took only an estate for life in the premises in W.

EJECTMENT for premises at *Wybunbury*. The lessor of the plaintiff contended, that under the following will his father, *Richard Clarke*, took an estate in fee; but at the trial at the last summer assizes for *Cheshire*, Lord *Lyndhurst* being of opinion that *Richard Clarke* took an estate for life only in the *Wybunbury* premises, directed a nonsuit.

The will was as follows, and was duly signed and attested to pass real property.

"I *Edward Clarke*, of *Hough*, in the county of *Chester*, clerk, revoking all former wills by me made, declare this to be my last will and testament. First, I give and bequeath and charge *such part of my property as may be necessary and adequate for the payment of my just debts*; after which I will as follows: I forgive and discharge my mother *Elizabeth Clarke* from the payment of all sums of money due from her to me, of every kind and sort whatsoever, to enable her to apply the same for her sole use and benefit. I also give and bequeath to my brother *Charles Clarke* the sum of 100 guineas, with the watch left to me by my father. I likewise give and bequeath to my god-daughter *Hester Clarke* the sum of 100*l*. I also give and bequeath to my brother *Richard Clarke* *all that dwelling-house, malt-kiln, stable and garden, with all lands appertaining to the same, lately in the possession of John Steele of Wybunbury, or his mortgagee, the said property lying and being in the township of Wybunbury*. I also give and bequeath to my brother *Richard Clarke* all the share, right and *property* of the *Hough* estate, situate in the county of *Chester*, as left by my late father." The rest of the will was immaterial to the

question between the parties. The testator appointed *Elisabeth, Charles, and Richard Clarke*, executors of his will.

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Leave was given to move to enter a verdict for the lessor of the plaintiff, if the court should be of opinion that *Richard Clarke*, the father of the lessor of the plaintiff, took a fee-simple in the *Wybunbury* premises, as devised to him by the above will.

Jones Serjt. now moved accordingly. *Richard Clarke* took a fee in the *Wybunbury* lands, under the above devise. The testator, by charging his "property" generally with payment of his debts, charged his real property, for his personalty was liable without such direction. [Lord *Lyndhurst* C.B. The whole estate, not the individual taking it, or his interest in it, is here charged. Then the charge follows the estate, and each party who takes it takes subject to that charge. Had the individual devisee been charged in respect of the interest he took, he must have held long enough not to lose by the charge (a).] *Doe v. Richards* (b) shows that a devise of residue, the testator's legacies being paid *thereout*, passes a fee. [Lord *Lyndhurst*. That was there considered to import being *thereout* paid *by the devisee*; for the property had been previously devised. *Bayley* B. In the present case the testator charges the estate *before* he gives it to the devisee. Would not that be a charge on the estate in his hands, or in those of the heir at law? It is not a charge on the devisee personally, or on the estate, or in trust, taken by him under the will; had it been so he would have taken the fee; *Doe v. Snelling* (c), *Roe v. Dawe* (d).] The words *the said property* will pass the fee of the property in *Wybunbury*.

(a) See *Doe v. Snelling*, 5 East, 98.

(b) 3 T. R. 356. See 6 Cruise D. 255.

(c) 5 East, 98.

(d) 3 M. & S. 518.

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Per Curiam. That word is not here used to describe the quantum of estate to be taken in the premises, but their local description and situation only.

Rule refused (a).

(a) See *Oates v. Clayton*, 8 East, 141; *Doe d. Randall v. Tuckin*, 6 Taunt. 410; *Hardy v. Gardner*, 1 Brod. & B. 72; *Roe d. Child v. Wright*, 9 East, 259; and see 1 Jac. & W. 192; *Doe d. Harding v. Cooke*, 7 Bing. 346; *Doe v. Wentley*, 4 B. & C. 667; *Doe d. Sewell v. Parratt*, 3 B. & Adol. 469.

WARD and Others *against* SWIFT and Others.

A power of appointment was given by will, to be by *M. S.* "duly executed and published under her hand and seal in the presence of and attested by three or more credible witnesses."

M.S. signed, sealed and delivered, as and for her last will and testament, an instrument ending and attested thus:—

"In witness whereof I have set my hand and seal here to this 5th day of August A.D. 1801, in the presence of the underwritten.

AN issue directed by the court of Chancery having been tried, the following case was afterwards stated for the opinion of this Court, pursuant to a decree made on the hearing.

By indentures of lease and release, bearing date respectively the 9th and 10th days of November 1795, made between *Samuel Bladen* and *Martha* his wife of the first part, *Thomas Randall Swift* and *Mary* his wife of the second part, and *Thomas Finch* of the third part—reciting an agreement for the sale by the said *Bladen* to the said *T. R. Swift* of (the scite of a manor house and certain other messuages, lands, &c. &c. described); and also reciting that the sum of 1400*l.* agreed to be paid for the same was the separate money of the said *M. Swift*—It was witnessed that in consideration of the sum of 1400*l.* paid by the said *M. Swift* with her own separate money, with the privity, consent and concurrence of the said *T. R. Swift*, testified by his being a party thereto, and 5*s.* by the said *T. Finch* paid,

Mary Swift. (L. S.)—Opposite this was, "signed, sealed and delivered this 5th day of August 1801, as the last will and testament of the said testatrix *M. S.*, who in her presence and in the presence of each other have put our names as witnesses thereof. *H. F., J. G., R. F.*" Held, that the power was well executed, and the will valid.

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the said *S. Bladen* conveyed the said premises to the said *T. Fisch* and his heirs, to the use of such person or persons, and for such estate or interest, estates or interests, upon such trusts and to such uses, intents, and purposes, and with, under, and subject to such powers, provisoes, directions, limitations, contingencies, charges, conditions, and restrictions, and in such manner and form as the said *M. Swift* at any time or times thereafter, during the term of her natural life, by any deed, instrument or writing, deeds, instruments or writings, either with or without power of revocation and new appointment to be made by her duly executed under her hand and seal in the presence of, and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any instrument in writing in the nature of or purporting to be her will, or by any codicil *to be by her duly executed and published under her hand and seal in the presence of and to be attested by three or more credible witnesses*, notwithstanding her coverture with her then present or any future husband, and whether married or sole, should direct, limit, or appoint, give or devise the said scite of the said manor, and the said messuages, lands, tenements, closes, grounds, hereditaments and premises thereby granted and released, or expressed or intended so to be, or any of them, or any part or parcel thereof, and for want or in default thereof, as to the whole of the said premises, or such of them, or such part or parts or so much thereof of which no such direction or appointment, devise or disposition should be made, and if any such should be made, and it should be in any respect defective or incomplete, as and when the estate, right, or interest thereby limited, appointed, devised or disposed of should cease and determine; and in the mean time until the same should be made and take effect, to the use of the said *T. Fisch* and his heirs, for and during the term of the natural life of the said *M. Swift*,

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upon trust for her, and to authorize and empower and permit and suffer her from time to time during her life to receive and take the rents and profits of the said premises, and that her receipt or receipts, notwithstanding her coverture, should be effectual discharges for the same; and after the death of *M. Swift*, and in default of such appointment or devise made by her in pursuance of such power, to the use of *T. R. Swift*, his heirs and assigns for ever. Proviso that the monies arising from any sale, mortgage, &c. should be paid to the said *M. Swift*, or such person or persons as she should direct or appoint, and the same disposed of as she should think fit or direct or appoint, or otherwise the same should be invested in mortgage, government or other security or securities, in the name of the said *T. Finch*, upon trust to permit the said *M. Swift* to receive the profits.

The said *M. Swift*, on 5th *August* 1801, signed, sealed and delivered, as and for her last will and testament, an instrument of which a copy was set out in the case, but of which only the signature and attestation as follows is necessary to be stated.

“ In witness whereof I have set my hand and seal this fifth day of *August* A. D. 1801, in the presence of the underwritten.

Mary Swift. (L. S.)

Signed, sealed, and delivered this 5th day of *August* 1801, as the last will and testament of the said testatrix, *Mary Swift*, who in her presence and in the presence of each other have put our names as witnesses thereof.

Henry Francis, No. 15, *Bridge Road*, *Lambeth*.

John Gaenham.

Ruth Francis.”

At the Lent assizes for *Kent* in 1832, before *Tindal* C. J. the jury found that testatrix, *Mary Swift*, was

on 1st *August* 1801 of sound mind, and that *she signed, sealed and delivered* the said instrument as her last will and testament in the presence of the three witnesses attesting the execution thereof. The question for the opinion of this court is, whether the will of *Mary Swift*, dated 5th *August* 1801, was a due execution of the power which she had under the deed of the 10th *November* 1795?

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Hutchinson for plaintiff. This will was duly executed according to the direction of the power, though the clause of attestation does not also state the will to be "published" in the words of the power. Though the publication of a will is not made necessary by the statute of frauds, 29 C. 2. c. 3. s. 5; the meaning of the term must here be considered as it has been introduced into this power. In *Moody v. Reid* (a), *Gibbs C. J.* said, that the term publication, (as applied to the attestation of a will) was a term in that sense unknown to the law, and could only be supposed to be that by which a person designates that he means to give effect to a paper as his will; for if publication is a mere declaration or proclamation of a testator's intention, the delivery by this testator amounts to that declaration.

It may be said that there is no attestation by whom the will was delivered, but unless the words "witnesses thereof," show that what goes before, *i. e.* the delivery by *M. Swift*, was attested by them, those words can have no effect.

In *Stanhope v. Keir* (b), the power directed the signature and publication of a will to be attested. The witnesses only subscribed their names after "in the presence of;" that was clearly insufficient. [Lord *Lyndhurst C. B.* In that case there was no attestation of the publication as required by the power. Is not delivery as his last will and testament equivalent to a

(a) 7 Taunt. 335.

(b) 2 Sim. & Stu. 37.

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publication? However, this attestation does not state in precise terms that the will was signed, &c. *by* the testatrix as her last will, but that it was signed, &c. *as* the last will, &c. of the testatrix. They may say it was signed, &c. by some other person.]

Platt for defendant. This attestation has not so far complied with the directions of the power as to be a valid execution of it. The object of the creator of the power was to prevent a hasty execution of the appointment to the injury of the heir at law, and therefore its requisites, though immaterial, must be strictly complied with; *Hawkins v. Kemp* (a). [Lord *Lyndhurst* C. B. There is no doubt that arbitrary forms required by the creator of a power must be complied with in the instrument of appointment, though they be not essential to the validity of such an instrument (b). Then the publication is not here attested as required by the power; for, consistently with this attestation, the will might have been published in the name of *Mary Swift* by any one else. For though her name appears subscribed to the will, it is not found by whom it was so subscribed; it might have been so signed elsewhere by another person, and afterwards brought into her presence, and there acknowledged by her as her will in the presence of the witnesses who might attest that fact. No defect in the execution of the power appearing on the attestation can be supplied by parol (c). 2dly. Publication is not attested. It is different from and more than a bailment by delivery. [*Bayley* B. Assuming that to be so, the whole expression must be taken "as her last will and testament." Suppose she had signed and sealed the instrument while alone, and had afterwards acknowledged her signature in the

(a) 3 East, 443.

(b) See *Doe d. Hodgkiss v. Pearce*, 2 Marsh. 102; 6 Taunt. 402, S. C.(c) *Ibid.*

presence of the witnesses, would that have sufficed?] It might under the statute of frauds, which does not require publication; *Westbeech v. Kennedy* (a): but it would not have satisfied this power, for the three acts of signature, sealing and publication, must all three be performed before witnesses. Lord *Lyndhurst* C. B. The difficulty is, whether this attestation imports that the will was signed, sealed and delivered in presence of the witnesses, for they would be witnesses *thereof*, if it had been only acknowledged and not signed in their presence. They would be witnesses of the signing and sealing, if those acts were merely acknowledged before them; but by the power the will is to be duly "executed and published under her hand and seal *in the presence of and attested*" by three witnesses. Could the acknowledgment before them of her previous signing and sealing elsewhere satisfy that direction? What a jury would be directed to presume as a fact rite actum is not a sufficient attestation of a power which directs a special mode of execution not required by common law: "duly executed" would not require a seal.]

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Hutchinson in reply. A due execution within the statute of frauds has been shown, and if so, why should not a subsequent acknowledgment of such execution be sufficient? It cannot be assumed that any person other than *M. Swift* executed, or the words "witnesses thereof," and "in the presence of," would have no effect. [*Bayley* B. The breaks in section five of the statute of frauds, which directs the signature and attestation, should be noticed. Suppose this will had been signed by a third person in the presence of testa-

(a) 1 Ves. & B. 362; and see 3 Starkie on Evid. tit. Wills, 1686 to 1689; Chitty's Statutes, same title.

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trix, by her express directions, according to the statute, could that be said to be a good execution of this power?]

Cur. adv. vult.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and are of opinion that the will of *Mary Swift* was a due execution of the power which she had under the deed of 10 *November* 1795.

LYNDHURST.

J. BAYLEY.

W. BOLLAND.

J. GURNEY.

PIGOTT *against* KEMP and Others.

In trespass for assault, a plea stated that *J. E. and S. B.* were possessed of a dwelling-house and close, and being so possessed the plaintiff was wrongfully there (a) making a noise &c., and that defendants, as servants of *J. E. and S. B.*, and by their command, requested him to depart, and he refused; whereupon defendants, as their servants, gently laid hands on plaintiff &c., and because plaintiff was armed with pistols and assaulted them, they, to protect themselves, necessarily laid hold of and a little hurt the plaintiff:—Held, that a general replication *de injuriis* is good, for the command of *J. E. and S. B.* may be involved in the issue so raised, without any special traverse.

(a) See *post*, 133, n. (a).

leave or licence and against the will of the said *J. E.* and *S. B.*, and thereupon the said defendants, as the servants of the said *J. E.* and *S. B.*, and by their command, then and there requested the said plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house and close, which the said plaintiff then and there wholly refused to do, whereupon the said defendants, as the servants of the said *J. E.* and *S. B.*, and by their command, in the defence of the possession of the said last-mentioned dwelling-house, gently laid their hands on the said plaintiff in order to remove him from the dwelling-house, and because he the said plaintiff was then and there armed with divers, to wit, two loaded pistols, and then and there assaulted the said defendants with the said pistols, and used violent and menacing language and gestures, and put them the said defendants in alarm and peril of their lives, they the said defendants, in order to protect and defend themselves, and because they could not otherwise protect and defend themselves, wrested and took the said pistols from the said plaintiff, and in so doing necessarily and unavoidably seized and laid hold of the said plaintiff by his arms and a little squeezed the same, and necessarily and unavoidably gave and struck the said plaintiff a few blows and strokes, and necessarily and unavoidably a little shook and gently pulled about him the said plaintiff, and necessarily and unavoidably a little rent, tore and damaged the clothes and wearing apparel of the said plaintiff, and necessarily and unavoidably a little beat, bruised, wounded, and ill-treated him the said plaintiff, doing no unnecessary damage to the said plaintiff on the occasion last aforesaid; which are the said supposed trespasses in the introductory part &c. mentioned.

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Replication *de injuriâ*, and special demurrer thereto. The points marked to be contended by defendant were, first, the duplicity of the replication, in not admitting or protesting any of the allegations in the plea, but involving them all in the issue. Next, that the replication put in issue authority and command, which ought to have been separately traversed; and also put in issue with other matter title and interest in land.

Byles in support of the demurrer. This replication is multifarious, in imposing on the defendants a necessity to prove eight distinct allegations stated in their plea; so that while the plaintiff may content himself with adducing evidence to disprove any one of them, the defendants must go to trial prepared to support every one, without knowing the particular one against which the plaintiff directs his attack. [*Bayley* B. The putting in issue a multiplicity of facts in one plea does not make it bad if they all lead to one conclusion, and together amount to but one defence; *Selby v. Bardons* (a).] That rule was the ground of the decision in that case, (though Lord *Tenterden* differed,) and previously in *Robinson v. Raley* (b), and *O'Brien v. Saxon* (c); but in all those cases possession of the party at the time was alleged: whereas it is wanting in this plea, which alleges many distinct matters not reducible to one proposition. [Lord *Lyndhurst* C. B. The plea imports an actual possession by *Easto* and *Bullen* as well as the plaintiff at the time; and the replication is constantly in this form, where the defendants rely on possession only. Is there any doubt except as to the command? *Bayley* B. Are the facts in this plea any more than one excuse for a trespass?]

(a) 3 B. & Ad. 19. See that judgment affirmed in error *post*, this vol.

(b) 1 Burr. 316.

(c) 2 B. & Cr. 908.

But the issue, if not multifarious, involves authority and command. Now command generally cannot be involved in the issue, but, if at all, must be separately traversed (a). The text books say, if a man justify by warrant of another, *de injuriâ* is not proper (b). Mr. Serjt. *Williams*, in 2 *Saunders*, 295 b, adopts the declaration of *Eyre C. J.* in *Jones v. Kitchen* (c), that that replication is not allowed, if the plea relate "to any commandment." [*Bayley B. Crogate's* case (d) shows that an authority mediately or immediately emanating from the plaintiff must not be involved in the issue. Here the command is from a stranger.] It is difficult to perceive why, if the command of the plaintiff may not be involved in the issue, the command of a stranger may. In both cases two questions are involved, the existence of the party to give the command and that of the command itself. But before as well as after *Crogate's* case, there are authorities to show that a command cannot be so traversed, though not derived from the plaintiff. *Fitzherbert's Abridgment*, tit. *Issue*, pl. 163. *Brooke's Abridgment*, tit. *De son tort demesne*, pl. 42. Again, 23 *Hen. 8. c. 5. s. 11.* implies that the general replication *de injuriâ*, specially provided by that act in actions for trespasses done by authority of the commissioners of sewers, was not good at law. [Lord *Lyndhurst C. B.* That might have been inserted to remove all doubt.] *Finch's Law*, 895, states that a warrant from a justice cannot be so traversed, and it is put on the same ground as a license from the plaintiff. *Chauncey v. Win* (e) is the same way.

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(a) 2 *Wms. Saund.* 295, b. citing *Jones v. Kitchen*, 1 *Boo. & Pul.* 80; *Doctrina Placitandi*, 113.

(b) *Stephen on Pl.* first ed. 188, 276; 1 *Ch. on Pl.* 514.

(c) 1 *Boo. and Pul.* 80.

(d) 8 *Co. R.* 66, b. third resolution.

(e) 12 *Mod.* 580; *S. C.* Lord *Raym.* 700; 1 *Salk.* 628.

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The justice's warrant is either a matter of record or not; if it is, *Selby v. Bardons* is wrong; if it is not, then the command of a stranger is not traversable by the general replication *de injuriâ*. [Lord *Lyndhurst* C. B. On the principle laid down there by Lord *Tenterden* himself, we should, in cases like this, adhere to the decisions. What a justice returns to quarter sessions may be matter of record. *Bayley* B. I am not aware that a single justice forms necessarily a court of record; though, if he acts judicially, it may be different from the committing a man charged with an offence. In the case from *Brooke* the court held that it should be put in issue that the ancestor did not hold by knight's service, or, that he did not command; but that the tenure *and* the command could not both be put in issue.] There is no intimation in the above authorities that the command to be so traversable must be derived mediately or immediately from the plaintiff. (a) [*Bayley* B. Where defendant claims by authority from the plaintiff *himself*, *de injuriâ* generally is not a good replication.

Secondly, a claim of interest in land being apparent on the face of the plea, the traverse in this replication, though general, involves the title of *Easto* and *Bullen* to the possession of land, and is therefore contrary to the second resolution in *Crogate's* case. In *Hall v. Gerard* (b), cited by *Parke* J. in *Selby v. Bardons* (c), the fact of possession was held to be traversable; but the party alleged to have possession was, in that case, removed from the actual enjoyment of the land. Here, unless *Easto* and *Bullen* were rightfully in possession, their command would be no defence; now not even they are alleged to have been

(a) *Comyns's Digest*, tit. *Pleader* (F. 22.) was cited by *Bayley* B.

(b) *Latch*. 221.

(c) 3 B. & C. 11.

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actually in possession of the land, but the plaintiff is stated to have been in possession, and as the allegation that his possession was unlawful, is in fact traversed by him, *Easto* and *Bullen* appear to have had only a right of possession, or a possessory title which cannot be traversed generally. [Lord *Lyndhurst* C. B. All three were in possession. *Bayley* B. The mistake of stating the plaintiff to be *in possession* may be so material, that we might not give judgment on such a record (a).] The title of the plaintiff is also involved in this issue, for the title to the land is not laid in the defendants but in other persons, and the fact and legality of the plaintiff's possession are in issue, and must be proved as matter of substance. They are not mere inducements as in *Taylor v. Markham* (b).— [Bayley B. The plea is a chain of many links or facts making a single defence, and the plaintiff was not bound to single out any particular one. Lord *Lyndhurst* C.B. All the facts stated in the plea conduct to and terminate in the battery, which is the subject of charge; so that independently of the command, the whole of them constitute one defence.]

Biggs Andrews contra, was directed to confine himself to the question whether the command could be traversed by the general replication. *Selby v. Bardons* is directly in the affirmative, the command being involved in that issue. All the cases have distinguished between justification under matters of record, and under things not matter of record. *Chauncey v. Win* is also in point, for Lord *Holt* took notice of the command being there traversed. [Bayley B. That issue

(a) It was here agreed that it should be considered as if the defendant had pleaded that plaintiff was wrongfully *there* making noise, &c.

(b) Yelv. 157.

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was said to involve matters of record, for one defendant justified as a commissioner of excise, and the other as his servant under his warrant.]

In *Archbishop of Canterbury v. Kemp* (a), Coke said, *arguendo*, that *de injuriâ* was not a good replication where the defendant's plea claims for him an interest in the freehold, "but where one claims not any interest, but justifies by command or authority derived from another, it is otherwise." *Doctrina Placitandi* (p. 113, 115,) treats an authority derived from the plaintiff himself as distinct from one derived from another person, for the former affords a defence alone, while the latter is only one link in a chain of facts which, together, compose one justification. The defendants go too far in citing cases tending to show that the command could not be traversed at all, for *Chambers v. Donaldson* (b) overturned a similar doctrine in trespass to real property. This plea states merely one excuse resulting from a series of facts pleaded.

[*Bayley B.* If the command was not traversable, a man might justify the expulsion of a party in possession under the command of a perfect stranger. If the command was traversable, but only in the manner contended for, the result would be, that in trespass against a master and his servant justifying under his authority, the traverse in the replication might be general as against the master, but not against the servant. However, in many actions brought against several defendants for taking goods, all rely on a judgment recovered and *fi. fa.* issued against the plaintiffs, but justify in different characters, *e. g.* one as sheriff, another as plaintiff, and others as acting under the sheriff's authority. Is it not common to reply, admitting the judgment and writ, and stating that the defendants, *de in-*

(a) Cro. El. 539.

(b) 11 East, 63.

juris sui propriâ et absque residuo causæ committed the trespasses; thus, by one general traverse, involving in one issue the seizure as well as the command (a)?]

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The *Court* expressed a strong opinion against the demurrer, but, under the circumstances, gave leave to withdraw it, and amend, on payment of costs.

(a) See an instance, 3 Chitty on Pleading, 1204. 4th edit.

WHITTAKER against BARKER.

ASSUMPSIT for 185*l.* 19*s.* the aggregate of 25*l.* 19*s.* for work and labour, 80*l.* for the value of crops sowed by plaintiff and reaped by defendant, and 30*l.* for tillages and other work and labour bestowed by plaintiff on a farm of the defendant. Plea, non assumpsit, and set-off of 125*l.*; viz. two sums of 30*l.* for a year's rent due 25th *March* 1832, and of 95*l.* for a sum to be paid to defendant by plaintiff as an incoming tenant under an agreement. At the last *Yorkshire* assizes this case was tried before *J. Parke* J., and it appeared that in *May* 1831, the defendant, having on his hands a farm which had been quitted on the previous 25th *March*, let it to the plaintiff by written agreement for 14 years, at 30*l.* rent, accruing from the last-mentioned day. The plaintiff was to pay the defendant 95*l.* for the tillages and improvements already done on the farm, and was to receive upon quitting, from the suc-

Plaintiff agreed to take from defendant a farm for 14 years, and to pay him 95*l.* for tillages and improvements already done on it. By the same agreement the plaintiff was to receive, "upon quitting," from the succeeding tenant, the value, according to a valuation to be then made of the tillages, &c. done by him, and which he should leave on the farm. The plaintiff did not pay the 95*l.*, but entered and did tillages, &c. In three months after entry he said he would quit, and defendant said he might. No bargain was then made about the tillages, &c. the plaintiff had done. Held, that the circumstances under which he quitted were not such as would entitle him to recover the value of them under the agreement.

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ceeding tenant, the value, according to a valuation to be then made of the tillages, &c. done by him, which he should then leave on the farm. Tillages to the amount of 30*l.* were done by the plaintiff between *May* and *July*, but a disagreement having arisen on account of his not paying the 95*l.* to the defendant, plaintiff said he would quit, and the defendant replied he might. Plaintiff left the farm in *July*. The defendant took the crops of that year in order to set them off against the sum of 95*l.* due to him from the plaintiff, and on 25th *March* 1832 entered into possession and re-let the premises to another tenant, who then paid him 95*l.* for the tillages, &c.

The items of plaintiff's demand for work and for the crops were proved and allowed, as were both the items in the set-off; but the learned judge being of opinion that the plaintiff could not recover the 30*l.* charged for his tillages, nonsuited him.

Wightman moved for a new trial. If the 30*l.* ought to have been recovered by the plaintiff, he will be entitled to a verdict. First, if the landlord can set off against the claim in this action, the 95*l.* agreed to be paid by the plaintiff for tillages done before he entered, he will have received that sum twice; viz. from the plaintiff, as well as the tenant who succeeded him in *March* 1832. [*Vaughan* B. The change of tenant made no difference, for that tenant paid the 95*l.* not for the use of the plaintiff, but for tillages, &c. done on the farm in the autumn of 1831, after the plaintiff quitted. *Bayley* B. The 95*l.* was paid to the defendant for the improvements as they stood in the *March* of the succeeding year, 1832. Besides, had the farm not been re-let, could the plaintiff have sued the defendant for the 95*l.*?] Next, can the defendant have the tillages for nothing, on which 30*l.* was expended by the plain-

tiff, he being entitled *on quitting* to receive the value of them, and having quitted with the landlord's assent?

[*Bayley B.* The only bargain was, that if the tenant, the plaintiff, paid 95*l.*, the amount of valuation of the tillages at entering, and quitted at the period of time he ought to quit, that is, at the end of the 14 years originally agreed for, he should be entitled to the amount of a valuation to be then made of tillages done by him. But instead of holding for 14 years, as the defendant had a right to expect he would, he quits, by leave of the defendant, within the first year, without paying for the tillages, as had been agreed on. It appears to me that the tenant quitted on the terms of leaving the land in the state in which it then was. It does not appear that any thing was said about payment for the tillages done by the plaintiff; had that been required, it is very probable that the defendant would not have let him off his bargain. *Gurney B.* There was a difference about the non-payment of the 95*l.* by the plaintiff. The defendant agrees that he shall quit, and he quits without any stipulation about his own tillages. The single question is, whether he was entitled to the amount of them?]

The *Court* having intimated that they would confer with the learned judge who tried the cause, *Bayley B.* afterwards delivered their opinion.

We think that no rule should be granted in this case. The plaintiff seeks to recover three sums, one of 25*l.* 19*s.* for work done, another of 80*l.* for crops sowed by him and reaped and sold by the defendant, (about which two sums there is no question,) and a third of 30*l.* for benefits done by the plaintiff to the farm of the defendant in tilling it, and which are now incorporated with it. Against these sums the defendant sets off a claim of 80*l.* for a year's rent, and of 95*l.* for the

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sum to be paid to him under the agreement. The facts were these:—The defendant's farm became vacant at Lady-day 1831. In the succeeding *May* a bargain was made between plaintiff and defendant, that the plaintiff should take the farm for 14 years and pay 95*l.* at coming in, and that upon his "quitting" he should receive from the succeeding tenant the amount of a new valuation of crops and improvements effected by him on the farm. The important question now is, whether the plaintiff can charge the defendant with the latter amount, as he might have done had his tenancy continued during all the term contemplated at the time of making the original bargain. The circumstances under which the plaintiff quitted were, that in consequence of his not having paid the 95*l.* as agreed on, a difference arose, in the course of which he said he would quit, and the defendant said he might; but nothing passed at that time which amounts to a determination of the tenancy, or a surrender by operation of law (*a*). The first act done by the defendant on the farm to vest the property in it in him, is that of letting it to another tenant; for though he entered at Lady-day 1832, and previously took the crops in 1831, the evidence is, that he took them not for his own benefit, but as accountable for them to the plaintiff for their full value as against the 95*l.* due from him. That reduces the question to this, whether the plaintiff is entitled to charge the 30*l.* for tillages done on the farm? and we think that, under the circumstances of his quitting, which took place without the landlord's being apprised of it by any

(*a*) See *Mollett v. Brayne*, 2 Camp. 103, and *Manning's Index*, 1st ed. 151, confirmed in banc, and cited by *Holroyd J.* in *Thomas v. Cook*, 2 B. & Ald. 121, and relied on by *Hullock B.* in *Doe d. Huddleston v. Johnston*, *M'Lehnd & Younge's R.* 146; and see *Thomson v. Wilson*, 2 Stark. 379. S. P. But see *Whitehead v. Clifford*, 5 Taunt. 518; and *Johnston v. Huddleston*, 4 B. & Cr. 930.

bargain, he is not. We are of opinion that such a quitting is not a "quitting" under the terms of the tenancy, but was in reality a running away from the land, which entitled the defendant, as its owner, to take possession of it in whatever state it might be, without making the tenant compensation for any improvements made by him on it.

The ground of our judgment is this, that at the time when the plaintiff quitted the farm there was no bargain that he should be paid for the tillages, &c. which he had executed; and as the case does not, for the reasons stated, fall within the terms of the written agreement entered into when he entered, he cannot claim under it for the improvements he may have made. The nonsuit was right.

Rule refused.

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FREAME *against* MITFORD.

G. **WILSON** had obtained a rule to deliver up the bail bond to be cancelled on entering a common appearance, on her affidavit that she was married to and was the wife of *J. M. Esq.*, and had never represented herself to be otherwise, and was known to the plaintiff to be a married woman when he arrested her.

A married woman will be discharged from arrest on filing common bail, or the bail bond will be delivered up to be cancelled, if her coverture is not disputed, and she has used no deceit before or at the time of obtaining the credit; nor will her subsequently giving a bill of exchange to the plaintiff in part payment vary the rule.

Whitmore showed cause. The plaintiff's affidavits show, that he and other tradesmen with whom the defendant dealt believed her to be a widow, that she was trusted as such by them, and would not have been so trusted had her coverture been known. She ordered goods at the plaintiff's shop at *Worcester*, in *May* 1830, and being then in company with her daughter, a lady well known to the plaintiff to be resident at that place in a respectable station of life, the plaintiff made

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no inquiries about her situation. On the plaintiff's subsequently applying for his bill of 57*l.*, the defendant could not pay, but on his importuning her to give a promissory note for 30*l.* she offered by letter to give him her promissory note at two months for 30*l.* in part payment, and afterwards accepted a bill for that amount drawn by the plaintiff. She had previously paid another debt in *Worcester* by giving the tradesman two bills with her name on them. It was also sworn that the plaintiff had been informed that the defendant had long lived separate from her husband.

[*Bayley B.* What part of the affidavit shows that the plaintiff had no reason to suspect the defendant to be a married woman? *Vaughan B.* Did she do any act or make any declaration from which the plaintiff might conclude her to be a single woman?]

The rule is distinct, that if the defendant practised any fraud in holding herself out as a single woman, this motion will not succeed; *Partridge v. Clark (a)*. Now *Prichard v. Cowlam (b)*, followed up in *Jones v. Lewis (c)*, distinctly shows that the accepting and issuing a bill by a woman is such a representation by her that she is single, as to preclude the court from giving her summary relief as a married woman. [*Bayley B.* In this case the letter was written and the bill sent long subsequently to the period of incurring the debt. That period is important. In *Collins v. Rowed (d)*, the court said, that a married woman's discharge as such was not now refused merely because her coverture was not notorious, and the plaintiff had trusted her as a *feme sole*. That if a woman deceives a plaintiff with respect to her condition by a falsehood, the court will not discharge her; but as in that case the defendant had not used any deceit by representing herself as a *feme sole*, she was entitled to be discharged. Here

(a) 5 T. R. 194. (b) 2 Marsh. 40. (c) Id. 385; 7 Taunt. 53, S. C.
 (d) 1 New R. 54; and see *Waters v. Smith*, 6 T. R. 451.

no inquiry was made as to the defendant's coverture.] In *Collins v. Rowed* the defendant had not given any bill. [*Bayley*, B. Had you been deluded by seeing the defendant's acceptance, into believing her to be single, and giving her credit accordingly, the case might be different; but in this case the acceptance was given as a security for the old debt, and did not at all conduce to the giving the original credit. In *Partridge v. Clark* the defendant was clearly not entitled to be discharged, but the positive affidavit of the marriage is not here contradicted.]

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G. Wilson in support of the rule. The acceptance for 30*l.* was obtained by the plaintiff's importunity; 15*l.* of that sum having been paid, the defendant must have been arrested in part for the remaining amount due for the goods. Then *Collins v. Rowed* applies, for the defendant makes no misrepresentation, and the plaintiff no inquiry.

BAYLEY B. (a)—It is very desirable in cases of this kind, that we should act on certain grounds, so that it may be clearly known what cases are and are not within the rule on the subject. In this instance there is a positive affidavit of the defendant's marriage, not brought into question by any affidavit on the part of the plaintiff. Then if such a marriage be proved to have taken place, the plaintiff would ultimately be defeated at the trial of the cause, on a plea of coverture. On that account, therefore, we ought not hastily to give that encouragement to proceed which would put the parties to the additional expenses of a trial, though by discharging this defendant we do not prevent the plaintiff from going on. I take one rule to be, that if the affidavits raise any degree of doubt whether the marriage exists or not, the courts will not interfere in this sum-

(a) Lord Lyndhurst was sitting in equity.

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mary way. Another rule is, that such relief will be refused if the party making the arrest can show that the defendant, at the time of obtaining the credit, has in any respect affirmatively deceived him, by representing herself to be what she is really not. There was one case where the marriage was notorious, but the woman had stated herself to have an act of parliament for a divorce. In another the woman represented herself as having a separate property. In this case it does not appear that at the time the goods were obtained there was any representation that she was not a married woman; and there is no doubt of the fact of her marriage being still subsisting. Then though this may turn out hard on the plaintiff, he should, as a tradesman, have made some inquiry, if not of the defendant herself, at least of her daughter or her daughter's husband, or some other member of the family, whether she was in such a situation as would enable her to pay for those goods. It is true that a bill of exchange, accepted by the defendant, was afterwards given by her, that being an instrument which would not bind her as a married woman: and had the goods been originally furnished on the security of this bill to be given, I might have been of a different opinion; but the debt was here incurred antecedently to the giving the bill in question. That brings this case within *Collins v. Rowed*, which I cited from the *New Reports*, where, as here, there was nothing by which the plaintiff could have been deceived, except by the circumstances under which the defendant was living. The state of facts in that case corresponds exactly with those which occurred here at the time of contracting this debt.

VAUGHAN B.—No doubt is here thrown on the co-venture, nor does any direct misrepresentation appear

to have taken place at the time of contracting the debt. Then it was the duty of the tradesman not to have given credit too lightly, or without instituting proper inquiries.

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BOLLAND and GURNEY Bs. concurred.

Rule (not moved with costs) absolute
without costs.

HYDE *against* LATHAM and DRY.

LATHAM *against* HYDE.

THE first action was in trespass, for entering the plaintiff's house and taking goods there; with pleas of the general issue and special justifications of entering the house. The plaintiff had a verdict on the general issue, the defendant on the justifications. The second action was assumpsit for a money demand, and the plaintiff had a verdict.

An attorney who, though not admitted in the Exchequer, conducts an action there in his own name, (notwithstanding 2 G. 2. c. 23. ss. 1, 5 & 10.) cannot recover his fees or costs out of pocket from his client, and has therefore no lien for them upon a judgment recovered. Thus the costs of one action may be set off against those of another, without allowing him such fees.

Tomlinson had obtained a rule to set off the amount of the damages and costs in the second action, against the amount of the damages, and the balance of costs in the first action, after first deducting the costs of the issues found for the defendant in that action, without allowing the costs of the plaintiff's attorney in that (the first) action. The affidavits showed that the plaintiff's attorney had conducted the proceedings in his own name, he not being an attorney of this court, and that *Dry* acted as bailiff of *Latham*, and was indemnified by him.

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Wightman showed cause. Whether the plaintiff's attorney could sue for his fees or not, he has at all events a lien for his costs out of pocket, on the judgment recovered in the first action, which had become the plaintiff's property. [*Bayley* B. Money out of pocket, though spent in the course of legal proceedings, cannot be recovered as money paid, if the plaintiff, as an attorney, ought to have delivered a bill, but has neglected to do so. Lord *Lyndhurst* C. B. The plaintiff's attorney had no right to conduct his client's cause in this court except in the name of another attorney, then how could he sue his client for sums paid in the course of a proceeding to which he could not be legally a party in his own name?] The client himself makes no objection here.

Coltman and *Tomlinson*, in support of the rule, were stopped by the court. They mentioned *Vincent v. Holt* (a).

LORD LYNTHURST C. B.—That class of cases was lately reviewed in this court, and the authority of that decision was questioned (b); but the question before us is a different one, and as it respects the attornies of this court arises on 2 G. 2. c. 23. s. 1. If upon that act we are of opinion that the attorney of the plaintiff in the first action could not sue his client for his fees, he would be driven to contend that he has nevertheless a lien for them, so as to detain the produce of the judgment recovered. But that position cannot be supported.

BAYLEY B.—The statute of 2 G. 2. c. 23. prohibits an attorney from acting in any other court than that of which he is an attorney, except in the single instance described in section 10, that he may sue and defend, &c.

(a) 4 Taunt. 452.

(b) See *Attorney-General v. Mallin*, vol. ii. 516.

in the name of an attorney of another court, by his consent in writing, signed by him. Then it seems to me that where that direction is not complied with, no action can be maintained by an attorney for fees incurred in conducting an action in his own name in a court in which he is a stranger, contrary to the enactments of the statute. It follows that he can have no lien for them.

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Rule absolute.

BADDELEY *against* OLIVER.

BY 47 G. 3. c. xxxvi. being an act for the more easy and speedy recovery of small debts within *Tipton* and several other parishes therein mentioned, in the counties of *Worcester* and *Stafford*, a court of requests was created to be held at *Oldbury* in the parish of *Halesowen*, for the recovery by any person of *debts not exceeding the value of 5l.* due or owing to the plaintiff, by or from any other person or persons whomsoever inhabiting, residing, or being within the limits of the said several parishes, &c. or either of them, or keeping or using any house, warehouse, wharf, &c. or frequenting any market or seeking a livelihood, or in any way trading or dealing within the same.

By section 28 the act shall not extend to any debt for any sum being *the balance of an account or demand originally exceeding the sum of 5l.* By section 29, if any action or suit for any debt recoverable by virtue of the act in the said court of requests, shall be com-

Where the plaintiff recovers a verdict for less than 5l. against a defendant residing within the jurisdiction of a local court of requests created by statute, the defendant may, within the first four days of the next term, move to enter a suggestion on the roll to deprive the plaintiff of costs, though the judge at nisi prius had made an order under 1 W. 4. c. 7. s. 2. that the plaintiff

should have execution within a time fixed, upon which final judgment had been signed and execution issued.

But *semb.* it should be made part of the motion, that so much of the final judgment as relates to costs should be struck out of the roll.

The general test by which the court will decide whether the plaintiff ought to have sued in a court of requests, is the amount proved at the trial and found by the verdict of the jury in the superior court, and not that which the plaintiff claims to be due.

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menced in any other court soever or elsewhere than in the said court of requests, the plaintiff in such action shall not, by reason of a verdict for him or otherwise, have or be entitled to any costs whatsoever.

The writ was sued out for 13*l.* 2*s.* A set-off of 7*l.* 8*s.* was pleaded. At the trial at the last *Stafford* assizes it was agreed that the cause should be referred to a barrister, to certify for which party a verdict ought to be entered, and that the plaintiff should not be delayed in obtaining execution for more than a month, if he obtained a verdict. At the reference the plaintiff's demand having been reduced to 4*l.* 1*s.* 1*d.* and the set-off to 2*l.* 12*s.*, the arbitrator certified that a verdict ought to be entered for the plaintiff for 1*l.* 9*s.* The defendant's attorney objected before the arbitrator that the plaintiff was not entitled to costs; but he having declined to decide that question for want of jurisdiction, the defendant's attorney consented that the judge should certify that the plaintiff should be at liberty to issue execution within a week from that time. Mr. Justice *Bosanquet* certified accordingly under 1 *W.* 4. c. 7. s. 2, for execution for debt and costs to issue within a week, but was afterwards applied to at the same assizes to rescind that certificate, on the ground that by the above local act the plaintiff could not have his costs. After reading the affidavits on both sides, as also the record and the local act, the learned judge refused to rescind his certificate, and a *ca. sa.* accordingly issued against the defendant for 62*l.* and upwards, which he paid under protest. The plaintiff's affidavits also stated the debt really due before action brought to have been a sum named and above 5*l.*, and that above 5*l.* remained due to plaintiff after allowing for a sum deducted from his demand by the arbitrator.

On the second day of *Michaelmas* term *Campbell* obtained a rule calling on the plaintiff to show cause

why the defendant should not enter a suggestion on the roll to deprive the plaintiff of costs under the above act, and why the sheriff should not retain the sum levied. His affidavits stated the above facts, and also that the defendant had for 17 years last past resided, and still continued to reside, in the parish of *Tipton*, and within the jurisdiction of the court appointed by 47 G. 3. c. xxxvi. commonly called the *Oldbury* court of conscience act, and that the debt due to the plaintiff might have been recovered in the court so established.

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R. V. Richards and *Follett* for the plaintiff. This action was commenced for a sum due on a balance of complicated accounts, and not recoverable in the court of requests. [*Bayley B. Shaddick v. Bennett* (a), shows that our judgment as respects the question of costs is to be ruled, not by the amount demanded by the plaintiff, but by that proved at the trial to be due.] If that rule be adhered to in every case, the unforeseen absence of a witness, by occasioning a failure of proof as to a large item, might reduce the demand below 5*l.* and subject the plaintiff to costs. [*Bayley B. Primâ facie* the amount of debt found by a jury is taken to be the amount of the debt due, but if it was shown that the sum actually due above 5*l.* was reduced to less than that sum by items of set-off, by part payments by the defendant (b), or by absence of a witness from illness, the rule might be relaxed (c). But a plaintiff's "demand" is the sum actually due to him, and the object of the local act is to compel plaintiffs, to whom no more than 5*l.* is due, to sue in local courts. This

(a) 4 B. & Cr. 769; and see per Lord Lyndhurst C. B. *Drew v. Coles*, Vol. II. 510.

(b) See note at end of case.

(c) See *Horn v. Hughes*, 8 East, 547, and *ante*, Vol. II. 510.

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case is not within its purview, for the court must decide whether the action was *bonâ fide* commenced for more than 5*l*. The reduction to 4*l*. 1*s*. could only have taken place by allowing an amount as a set-off which would not appear on the verdict: whereas the plaintiff swears that more than 5*l*. was due. The defendant's affidavit does not contradict that, but only states what the arbitrator found. Besides, this motion is precluded by the judge's certificate at the assizes, for a suggestion of this nature cannot be entered after final judgment has been signed (a). That rule is not altered by 1 *W*. 4. c. 7. s. 4, but rather derives strength from that provision, which allows final judgments to be vacated, notwithstanding the judge's certificate, in some enumerated cases, of which the present is not one.

Campbell in support of the rule. No doctrine of law is more clearly established than that where a suggestion is moved for under a court of conscience act, the verdict of the jury is the standard of amount, and estops the plaintiff from showing by affidavits that his actual demand was larger. Though nothing in 1 *W*. 4. c. 7. s. 4. authorizes a judge at *nisi prius* to deprive the plaintiff of costs, and section 4 in general terms empowers the court in banc to vacate a judgment signed in pursuance of section 2, its power to do so and enter a suggestion is therefore clear; it in general terms empowers a judgment signed under its provisions to be vacated, and the only question is, whether the application is in time? Now the defendant could not have moved earlier than the present term, being that as of which the judgment was signed against him.

(a) *Watchorn v. Cook*, 2. M. & S. 348; see also 5 M. & S. 510; 4 B. & Cr. 863.

BAYLEY B. (a)—I think that this rule for entering a suggestion ought to be made absolute. This local act (47 *Geo. 3. c. xxxvi.*) provides by s. 29, that if any action for any debt recoverable by virtue of that act in the court of requests thereby established, shall be commenced in any other court whatsoever, the plaintiff shall not, by reason of a verdict for him, be entitled to any costs whatsoever. The question therefore is, Whether this action was brought for a debt recoverable in the court of requests established by that act? Suits are authorized for any debt under 5*l.*, and the sum recovered by verdict in the superior court, in this instance, was 1*l.* 9*s.* 1*d.*, the original sum due having been found by the arbitrator, on the evidence before him, to be 4*l.* 1*s.* 1*d.* only, before its further reduction by the defendant's set-off to 1*l.* 9*s.* 1*d.* Then the plaintiff could not have had a verdict for 5*l.* even without the set-off. It has been held in *Shaddick v. Bennett* (b), and acted upon in this court in *Drews v. Coles* (c), that the amount recovered by verdict must be taken to be the amount of the debt actually due: and if we were to decide otherwise, we should, in every instance, be called on to retry the amount of the debt on contradictory affidavits. Then why should not this defendant deprive the plaintiff of costs? It is said that he is estopped from so doing by having agreed that execution should issue against him within a certain time after the trial. If the defendant was, at the time of making that agreement, ignorant of the provisions of the local act, he cannot be taken to have waived the protection that the law gave him, and he is not precluded from availing himself of it when he subse-

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(a) Lord Lyndhurst was sitting in equity. *Vaughan B.* was gone to chambers.

(b) 4 B. & Cr. 769.

(c) *Ante*, Vol. II. 503.

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quently became acquainted with it. Another reason is alleged that the judge at *nisi prius* virtually decided this question by letting his certificate stand for issuing execution on the 3d of *August*. But we are bound to see whether the question was within his jurisdiction. For, though if you refer a matter to an arbitrator, his decision is conclusive, yet, as a judge must necessarily decide in a public judicial character, his judgment (if erroneous) is open to correction; and if he was in this instance wrong in saying the act was not applicable, we are bound to revise his opinion, and to hold that his was not the tribunal to decide whether this suggestion should be entered on the roll or not.

It is said, lastly, that having suffered the judgment and execution to stand, without previously moving to vacate the judgment, the motion to enter this suggestion is now too late. But my construction of 1 *W. 4. c. 7.* is otherwise; for as before that act passed, final judgment could not be signed till after the first four days of the succeeding term, the motion to enter a suggestion might be made within those four days. Now in this case he took the earliest opportunity of coming to the only court competent to act on the subject, by moving to enter a suggestion within those four days. Nor are we prevented by sect. 4 of 1 *W. 4. c. 7.* from relieving this defendant; for the cases in which by that section judgments may be vacated, are only put as particular instances, and not as confining the rule to the matters there enumerated.

BOLLAND B.—The best rule for construction of acts relating to courts of conscience is to look to the finding of the jury, to ascertain what sum was recoverable, though that rule may not be in all cases inflexible. The argument for the plaintiff, founded on 1 *W. 4.*

c. 7. s. 4. is answered by the fact that this motion was made within the first four days of the term.

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GURNEY B.—I am of the same opinion. This is not one of those cases in which the court will not hold itself bound by the amount found by the verdict. The plaintiff's witnesses contradicted each other before the arbitrator, and the defendant's admission there, that 4*l.* 1*s.* was due to the plaintiff, was the only evidence on which he could have recovered at all. Then, unless he had chosen to be nonsuited, he must have taken a verdict for a sum smaller than 5*l.*, even before his claim was further reduced by the defendant's set-off. After taking that verdict, the consequences of that course must follow.

Rule absolute (a).

(a) In *Moore v. Jones*, May 8, 1833, the same principle was acted on after the principal case, as well as that of *Coles v. Drew*, Vol. II. had been cited. Platt showed cause against a rule obtained by *Thesiger* for entering a suggestion to deprive the plaintiff of costs, under the *Blackheath &c. Act*, 47 G. 3. sess. 1. c. civ., on the ground of his having recovered less than 5*l.* By a clause in that act its provisions are not to extend to any debt for any sum being the balance of an account or demand originally exceeding 3*l.* (see a similar clause in the principal case, p. 145.) The sum originally sought to be recovered was 16*l.* The defendant gave notice of setting-off 13*l.* 13*s.* The plaintiff's claim was reduced at the trial to 3*l.* 19*s.* in consequence of the absence of a witness, as sworn in his affidavits, and was further reduced to 1*l.* 9*s.*, by the proof of part payments made on account by the defendant. Verdict for 1*l.* 9*s.*

Lord LYNDBURST C. B.—The original debt, as proved at the trial, did not amount to 5*l.* Then no question arises on the construction of the clause. In *Fountain v. Young*, 1 Taunt. 60, the court of C. P. decided on similar words in the *Southwark Act*, 46 G. 3. c. lxxvii. s. 12. It was held, that if a demand originally above 5*l.* is reduced below that sum by partial payments, the plaintiff cannot be deprived of costs.

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Afterwards, in *Hilary* term, in consequence of a doubt whether the suggestion could be entered on the roll while a final judgment remained on it, *Talfourd* obtained an order to strike out so much of the final judgment as related to costs, and to enter the suggestion *nunc pro tunc*. The order was drawn upon reading the rules themselves, without further affidavit.

HEMBROW *against* BAILEY and Others.

Trespass for assaulting the plaintiff in the county of *Somerset*. The plea justified the assault, in defence of possession of a dwellinghouse, with an averment "which are the said supposed trespasses, &c. and whereof the said plaintiff hath complained against the said defendants," and concluded with a traverse "without this, that defendant was guilty elsewhere than in the said dwelling house."

Held, that the *quæ est eadem* included in the traverse

the place laid in the declaration, and that the plea was therefore bad on special demurrer for surplusage in adding a special traverse.

TRESPASS for assault. The venue was laid in *Somersetshire*, without alleging any parish or place. The 4th and 6th pleas justified in defence of the possession "of two houses of two of the defendants, laid to be situate in the county aforesaid." Averment *quæ sunt eadem*, with a special traverse "without this that the defendants were guilty of the trespasses elsewhere than in the said dwelling house situate as aforesaid." Verification. Special demurrers for duplicity in professing to justify the trespasses, and also traversing their commission in any other place than that in the justification—for traversing what cannot properly be traversed—and for containing two traverses of the same matter.

Follett in support of the demurrers. The averment '*quæ sunt eadem*,' sufficiently includes the averment that the trespasses justified took place in the defendant's dwelling house, and not elsewhere. *Courtney v. Satchwell* (a), *Hargrave v. Ward* (b), cited in Serjeant *Williams's* note to *Mellor v. Walker*, 2 *Saund.* 55. a

(a) *Stra.* 694.

(b) *Lutw.* 1457.

note 3 (a). Then on special demurrer the plea is bad for surplusage in adding the traverse, or the traverse is immaterial, and the same consequence follows.

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Erle contrâ. This action being transitory, and the parish or place being left at large in the declaration, the defence was local, resting on the assault having taken place within a particular house. Then the traverse was properly added in terms negating its having occurred, except in those limits only. The note cited from *Williams Saund.* 5 b. c. shows, that the course of the precedents is in favour of adding the traverse, and, among many others, cites *Madicin's* case (b), *Co. Lit.* 282, b. *Thomson v. Clark* (c), *Peacock v. Peacock* (d). In the same note Serjt. *Williams* adds, that on that account it is safe and proper to adhere to the usual course, and cites *Benjamin v. Howells* (e), where on the authority of *Thompson v. Clark*, cited by *Lee*, C. J. the court of K. B. held a plea bad for want of a traverse of the place in the declaration, though *quæ est eadem* was averred. That case occurred in 18 G. 2. long after the necessity for trial by a jury, partly consisting of hundredors from the neighbourhood of the vill laid, had been taken away by statute 4 Ann. c. 16. s. 6.

LORD LYNTHURST C. B.—Serjt. *Williams*, in the note quoted (5 d), shows that the reasons which made the traverse necessary in the ancient precedents being put an end to by statutes 16 & 17 C. 2. c. 8. and 4 Ann. c. 16. s. 6. it is now reduced to mere form, and suggests that the averment of its being “the same trespass” is

(a) The editors' note in the last edition, 5 s. n. (p) was also cited.

(b) 1 Sid. 293. temp. Car. 2.

(c) Cro. El. 705.

(d) Id. 42.

(e) 2 Saund. 5 d c, from MSS. Serjt. *Williams*; 1 Wils. 81, S. C.

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sufficient at this day, as including in itself a traverse of the place in the declaration. I am satisfied that the *qua est eadem* is sufficient, and that it was unnecessary to superadd the special traverse. The reason for the old rule having passed away, it ought not to govern our decision.

BAYLEY B.—All the facts alleged in the declaration are traversable as to time and place; then this plaintiff might prove an assault at any time and place. But when the defendant justifies an assault at a particular house and place, and alleges that that is the same trespass as is above complained of, does not that allegation virtually exclude all his liability at any other time and place? If so, the special traverse is a superfluous repetition, bad on special demurrer.

The defendant was allowed to amend without costs, by striking out the traverse.

See *Stephen on Pleading*, 1st edit. 204.

Earl of STIRLING *against* CLAYTON.

The plaintiff's declaration described him as Earl of *Stirling*. The defendant pleaded in abatement that the plaintiff was not, or is, Earl of *S.* A replication that he was, and still is, Earl of *S.*

concluding to the country, was held bad on demurrer, for default of showing how he claimed that dignity, so as to decide the mode of trial.

Semble, That the dignity thus claimed must be taken to be *English*, the christian and surname of the party not being stated, as must be done in case of dignities not *English*.

CASE for a libel, commenting with severity on certain claims alleged by the plaintiff to be Earl of *Stirling*, and as such to create Baronets of *Nova Scotia*, and to grant lands in *Canada*. The declaration described the plaintiff to be the Right Honourable *Alexander* Earl of *Stirling*, and afterwards averred that before and at the time of the committing of the grievances the said plaintiff was and still is Earl of *Stirling*. Plea in abatement: And the said J. C.

against whom the plaintiff in this suit hath exhibited his said bill by the style and title of *Alexander* Earl of *Stirling*, in his own person comes and says, that at the time of exhibiting his the plaintiff's said bill, he the plaintiff was not nor now is Earl of *Stirling*. Verification and prayer of judgment of the said bill, and that the same may be quashed.

Replication averred, that the said plaintiff was and still is Earl of *Stirling* in manner and form as is above alleged, concluding to the country.

Demurrer to the replication, stating for causes, that the said plaintiff had not in his said replication set forth how and by what means and in what manner his supposed right to the said dignity of Earl of *Stirling* hath accrued to him. And had not shown to the court in his said replication how and in what manner he himself or any ancestor of his attained to the said dignity. Nor whether or not he is Earl of *Stirling* by creation, or by writ, or by descent, or how otherwise. Nor that he was Earl of *Stirling* at the time of exhibiting his bill.

Hill in support of the demurrer. The replication is bad for concluding to the country, without stating that the plaintiff was a peer by descent (a). All the precedents show that that or some other mode of acquiring the dignity claimed should have been alleged by the plaintiff; for example, were the plaintiff a peer by writ, the writ should have been pleaded, and it would be triable by the record whether he had taken his seat (b); if by patent of parliament, it should have been set out, with a conclusion "as by the said letters remaining of record appears," *Blackmore v. Earl of*

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(a) Skinner, 520; Com. Dig. tit. Dignity. (D).

(b) Co. Lit. 16 b.

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Wigtown (a), and on rejoinder of *non concessit* the issue would have been triable by the patent itself. The defendant cannot safely take issue on this replication, for as the manner in which the dignity is claimed is not stated, the proper conclusion, and consequently the proper mode of trial, cannot be ascertained. In *Rex v. Cooke* (b), the plea in abatement stated that defendant was Lord *Stafford*, Baron *Stafford*; and Mr. Justice *Bayley* said, that that defendant was bound to show, not only his right to a peerage, but also how he derived that right. The cases of the Countess of *Rutland* (c), the Countess of *Shrewsbury* (d), and Lord *Abergavenny* (e), show that an issue whether a man be duke, earl or baron, shall not be tried *per pais*, but by the record by which it appears that he was a peer of parliament. If the defendant should join issue on this replication, the plaintiff might prove himself an earl of some other country, unless "Earl" can be said to be his surname.

Platt contra. [Lord *Lyndhurst* C. B. Should not the plaintiff have stated in his replication how he was an earl? The presumption must be, that an *English* earldom is intended. *Bayley* B. Must not a name and surname be given to a plaintiff? Then if a name of dignity be stated, it must be an *English* dignity (f).] 1st. The plea is bad for want of giving a better writ, as in cases of misnomer. [Lord *Lyndhurst* C. B. As the defendant says the plaintiff has no title at all, how can the plea give him a better writ? *Bayley* B. As the defendant's own name lies within his knowledge, it should be set out by him.] The averment in the

(a) 3 Wentw. 295.

(b) 2 B. & C. 871.

(c) 6 Co. 53.

(d) 12 Co. 94.

(e) Id. 71.

(f) For foreign noblemen are named esquires here unless they are knights, 2 Inst. 667.

declaration that the plaintiff is Earl of *Stirling*, should have been met by a plea in bar, and not by this plea, which is in form a plea in abatement, but is in fact rather in bar and justification of the alleged libel. 2dly. If this is considered merely as a plea of misnomer, the replication may be supported, for *Alexander* Earl of *Stirling*, at the beginning, may be one name; thus in *Scott v. Soans* (a), the words "*Jonathan* otherwise *John*," were held to be one christian name when prefixed to *Soans* as a surname. If so the conclusion to the country is right. The plea does not allege him to be a peer of the realm.

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LORD LYNTHURST C. B.—The name is treated in the declaration as a name of *English* dignity, and the plea and replication adopt it as such. Were it otherwise the plaintiff is not described rightly in the declaration, for he should have been described by his christian and surname (b). Then as it is not stated to be a foreign or other title, the court must assume it to be *English*: nor is the defendant prevented from pleading in abatement to the style and title assumed by the plaintiff in the action, because it is also averred in the declaration that he was and still is Earl of *Stirling*.

BAYLEY B.—The existence of a foreign dignity, or of a right to it, is triable by a jury; and the declaration might state the name and surname of the party, followed by his title of earl, &c. of some place without the kingdom of *England*; but though a plea in abatement must in ordinary cases give a better writ, it is also a rule that where a fact lies peculiarly within the knowledge of the opposite party, that party must allege it in pleading, and less particularity of statement is required

(a) 3 East, 111.

(b) See *ante*, p. 156, n. (f).

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from the party who, though not so cognizant of it, is called on to allege it in pleading. Here the plaintiff must know how he claims the dignity and what it is, nor can the defendant be compelled to state by his plea how the plaintiff ought to be described. The plaintiff's averment in the declaration of his being Earl of *Stirling* does not alter the case, though it may put him in difficulty as to a trial before a jury.

Platt had leave to amend on payment of costs.

SLACK qui tam against WILKIN.

An attorney who had been admitted before 1815, and had taken out his certificate yearly, neglected to do so for the year ending *November* 1816, but afterwards continued to take it out regularly. He practised at the quarter sessions in 1832. Held, that his admission and enrolment being void by 37 G. 3. c. 99. s. 31. he was liable for the penalties imposed by 22 G. 2. c. 46. s. 12, on

DEBT for penalties. The first count was framed on 22 G. 2. c. 46. s. 12. for acting as the attorney at a court of general quarter sessions of the peace of our lord the now king, held at *Cambridge*, for the county of *Cambridge*, with respect to a matter of a criminal nature, not being then admitted an attorney in any of his majesty's courts of record. The second count was on the above enactment, and also on 37 G. 3. c. 90. s. 31., and charged the defendant that having been admitted and inrolled an attorney, he did not, between 15 *November* 1815, and 16 *November* 1816, obtain a certificate from the commissioners of stamps to denote the payment of the stamp duty, whereby his admission and enrolment became void; and that he afterwards acted as an attorney of the general quarter sessions, with respect to a matter of a criminal nature; not having, after such admission became null and void, been admitted or readmitted an attorney. Another persons not admitted as attorneys, but practising as such at the quarter sessions. Quarter sessions how described in pleading.

count stated, that the defendant having been admitted and inrolled, but not being continued on the roll, practised. At the trial before *Tindal* C. J. at the last *Cambridgeshire* assizes, two acts of practising at the *Cambridge* quarter sessions in 1832 were proved, and the plaintiff had a verdict for two penalties of 50*l.* each, but the defendant had leave to move to enter a nonsuit. The defendant was admitted an attorney and inrolled long before *November* 1815, and had regularly taken out his certificate up to that time, but neglected to do so in the year ending *November* 1816, since which he had again taken it out yearly.

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Storks Serjt. moved according to the leave reserved. The plaintiff seeks to recover penalties on 22 *G. 2. c. 46. s. 12.* as blended with 37 *G. 3. c. 90. s. 31.* which avoids the admission and inrolment of an attorney who neglects to obtain his yearly certificate. But the two statutes were passed with totally different objects. The first was to prevent unqualified persons from practising at the quarter sessions, and the second for the purposes of revenue. In the penal part of 22 *G. 2. c. 46. s. 12.*, the words are "every person not being admitted and inrolled as aforesaid," here the defendant was admitted and inrolled. [Lord *Lyndhurst* C. B. Supposing the case to stand on 22 *G. 2.* alone, and that the plaintiff had himself applied to get his name off the roll, and had done so, could he have practised without incurring liability to penalties? The only question in the case is the omission in the penal clause of the words "continuing inrolled as aforesaid," previously inserted in the enacting clause.]

Storks then urged objections to particular counts, which the court rejected, on the ground that as some of them were good the verdict might be entered on

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Mansel took nothing by his motion.

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In *Pangden v. Kelly* the same rule was laid down on the same day.

STREET *against* Lord ALVANLEY.

In order to obtain a distringas, the party attempting to serve the writ of summons must leave a copy of it at the dwelling-house of the defendant.

GODSON applied for a distringas, but his affidavit did not state that the party attempting to serve the writ had left a copy of it with the person he saw at the defendant's dwelling-house, on the last time he called there in order to serve it.

BAYLEY B.—In order to obtain a distringas, a copy of the process should always be left. The court ought not to be satisfied with notice of an inferior description, for the party who attempts to serve the writ has the opportunity of giving the defendant the best notice of the object of his call, by giving a copy of the writ to the party he sees at the defendant's house.

Writ refused (a).

The copy of the writ of summons must be left on the third day at the last call for the purpose of serving the defendant with the summons, or no distringas will be granted.

(a) In *Hill v. Mould* and another case writs of distringas were moved for by *Petersdorff* and *Price* in Easter term 1833, on the 20th April. In one case, the copy of the writ of summons had been left at a third call, which took place on the second day; and in the other, at the second call.

BAYLEY B. (sitting alone) refused to grant the distringas as prayed, on the ground that the defendant was entitled to all the eighth day to appear in, computed from that day on which the service was completed; but gave leave to *Price* to renew his application, if any case could be found to show that it was not imperative that the copy should be left at the third call only.

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BRIAN *against* STRETTON.

A Copy of a writ of summons had been left at the defendant's dwelling-house, after three unsuccessful attempts to serve it personally. Five days after leaving the copy, *Chambers* moved for a *distringas* under 2 *W.* 4. c. 39. s. 3. stating that doubts had arisen as to the time when the motion might be made. For since 2 *Will.* 4. c. 39., the return, instead of being made on a day certain, as by the old process, is to be calculated from the day of its service, and the defendant is to appear in eight days from the time of such service. The question was, when the service was complete? From section 2 and the schedule, it might rather be inferred that the motion was too early.

Eight days must elapse from the day when the person who attempted to serve process last called at defendant's dwellinghouse, and left a copy of process, or no *distringas* will be granted.

On the 22d, *Price* mentioned *Fraser v. Case*, 9 Bingham 364.

Per Curiam. (*Lyndhurst C. B. Bayley and Gurney B.*) It is necessary to establish an uniform practice on this subject under the new act 2 *W.* 4. c. 39. s. 3. The general rule, as stated by *Mr. Manning* in his *Practice*, 1st ed. 23. was, that there should be three calls at the defendant's dwelling house, and that a copy of the writ of summons should be left at the last call, which must then have been made on the return day of the writ. We will concur with the other judges.

On the 24th Lord *Lyndhurst* said, "All the courts concur in opinion that the service of the copy of the writ of summons should be on the third day, at the time the last call takes place."

Writs refused.

On the 26th *Godson* moved for a *distringas*, the copy of the writ having been left at the time of the first call.

GURNEY B.—The Court has held that the copy cannot be left till the third time, in order that the defendant may not be misled as to the time in which he must appear; for he is to have eight days from the time of the service: now that is not complete till the third call.

Writ refused.

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BAYLEY B.—The defendant is allowed eight days to enter an appearance after the service of the writ of summons; which eight days, in cases where he cannot be personally served, are to run from the day on which the person who attempted to serve process last called at the defendant's dwelling-house and left a copy of process. The eight days ought to be calculated from that time, for that is to a certain extent *service*; and is that source upon which the *distringas* is permitted to issue.

The other Barons concurred.

Writ refused (a).

(a) See *Johnson v. Rouse*, 161.

NICHOLSON and Others *against* PAGET.

The following guarantie, "I agree to be answerable for the payment of 50*l.* for L. in case L. does not pay for the gin &c. he receives from you, I'll pay you the amount," is not a continuing guarantie.

ASSUMPSIT on a guarantie to the plaintiffs, distillers, who had been applied to by one *Lerigo* to furnish him with spirits.

"Mr. Nicholson,

"Sir,

184, Piccadilly, 25 May 1830.

"I hereby agree to be answerable for the payment of 50*l.* for *Thomas Lerigo*. In case *Thomas Lerigo* does not pay for the Gin, &c. he receives from you, I will pay you the amount. I am, &c.

"*Richard Paget.*"

The facts proved at the trial at the *London* sittings in last *Trinity* term, before *Gurney B.* were, that on the day after the guarantie was given, gin of 30*l.* value was delivered by the plaintiffs to *Lerigo*; that other supplies to the amount of 270*l.* were delivered to him between that day and 19th *July* 1831, all which were

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paid for with the exception of 31*l.*, which remained in arrear from *Lerigo* at the latter day. The amount of each supply had been always kept under 50*l.* The defendant contended for a nonsuit on the ground that this was not a continuing guarantie: *Melville v. Hayden* (a). The plaintiff replied that it was, and cited *Mason v. Pritchard* (b), and *Merle v. Wells* (c). The plaintiff was nonsuited, with leave to move to enter a verdict for 31*l.* A rule having been obtained accordingly,

Lloyd showed cause. A guarantie should be construed according to the intention of both the guarantor and guaranteed; and as the defendant is to reap no distinct benefit from his contract, it must be limited to his intent as apparent on the face of it. Then the presumption is, that he did not mean to extend his liability beyond the single sum actually expressed. *Melville v. Hayden* is strongly in the defendant's favour, and must rule this case. There the defendant guarantied "the payment of Mr. A. M., to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiffs." In that case *Bayley B.* after remarking that the words "quarterly account" did not vary it, and only meant that at whatever time the goods might have been delivered, the account for them should be rendered quarterly, added, "A party who takes a guarantie of this sort should carefully provide that there are words in it expressive of its being a guarantie for goods to be furnished by him from time to time;" (d) and *Mason v. Pritchard* was said to have gone as far as possible. But the guarantie there held to be continuing was given "for any goods he" (the plaintiff) "hath or

(a) 3 B. & Ald. 593. (b) 12 East, 227. (c) 2 Camp. 413.

(d) And see per Best C. J. in *Evans v. Whyte*, 5 Bing. 485.

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may supply." So in *Merle v. Wells*, and *Bastow v. Bennett* (a), guaranties for "any" goods furnished were held continuing guaranties: and Lord *Ellenborough's* opinion in the latter case rested on that word. *Hargrave v. Smee* (b), one of the latest cases, is quite distinguishable. [*Bayley B.* The guarantie there held to be continuing was to pay for goods to be delivered according to the "custom of trading" between the parties supplied and the plaintiff; that being shown to be the giving every month acceptances at three months, for the amount of the monthly supplies. That case turned on "the custom of trading." Here there is no relationship or course of dealing from which the inference can be drawn that this guarantie is continuing. The surety here fixes the amount guaranteed, and in respect of what, viz. of the gin furnished; as it seems, at one time. [*Bayley B.* "For the gin, &c." may mean for whatever gin.] The Court will not extend the defendant's liability, by holding this to be a continuing guarantie, unless required to do so by express and manifest terms on the face of it, showing such an intention by the defendant; *Melville v. Hayden*.

Jervis and Godson contra. Chief Justice *Tindal*, in *Hargreave v. Smee*, does not state the intention of the defendant to be the test whether the guarantie is or is not a continuing guarantie, but having stated the question to be, what is the fair import to be collected from the language used in the guarantie, says, that as well in that as in other instruments, if the party executing it leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself. *Mason v. Pritchard* is an authority that the words of a guarantie are to be taken as strongly against the party giving it as the sense of them would admit.

(a) 3 Camp. 220.

(b) 6 Bing. 244.

"Receives" must mean "habit of receiving." The instrument may be read in distinct sentences, and if they are transposed it will appear that the defendant agrees to pay for the amount of the gin, and then limits the amount by agreeing to be answerable for the payment of 50*l.* by *Lerigo*. Then his liability remained for gin which might from time to time be furnished, till notice given to put an end to the contract. See per *Wood B. (a)* in *Mason v. Pritchard*; and *Simpson v. Manley (b)*. [*Bayley B.* In the latter case the limits of responsibility were expressed; in this it is doubtful whether there was a limit or not. The distinctions are very nice, and we are desirous, as far as we can, to lay down a general rule. We will consider our judgment.]

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The judgment of the court was afterwards delivered by

BAYLEY B. (c)—The question in this case was, whether the guarantie was a continuing guarantie, or whether it had terminated by the payment of 50*l.*? The language of the instrument is in these words:—"Sir, I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*. In case *T. Lerigo* does not pay for the gin, &c. which he receives from you, I will pay you the amount."

Now this is a contract of guarantie, which is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person; and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. The language of the

(a) At *Nisi Prius*, 12 East, 228.

(b) *Ante*, Vol. II. 86.

(c) Lord *Lyndhurst* was in equity.

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first part of this guarantie is, "I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*." Now these words would *primá facie* import that the party giving the guarantie would be answerable for the payment by *T. Lerigo* of 50*l.* and no more. Then, is this engagement extended by the subsequent words, "in case *T. Lerigo* does not pay for the gin, &c. which he receives from you, I will pay you the amount?" Now these latter words do not profess to over-ride any particular period of time. This guarantie, therefore, must either be applicable to an indefinite time and determinable by notice, or be confined to the payment of the first sum of 50*l.* that becomes due; and we think that it is not applicable to an indefinite time, but is limited to the payment of the first 50*l.*, and is not a continuing guarantie. The case which comes nearest to the present is the case of *Melville v. Hayden*. There the words were, "I engage to guarantee the payment of Mr. *Amos Moulden*, to the extent of 60*l.*, at quarterly account, bill two months, for goods to be purchased by him of *William and David Melville*." That language was fully as strong as the language in the present case. There it was, "I engage to guarantee, &c. to the extent of 60*l.* Here it is, "I agree to be answerable for the payment of 50*l.*" The court, however, in that case held, that as soon as *Moulden* had paid to the extent of 60*l.* the guarantie was at an end. The distinction is and must be minute between those cases, where the guarantie has been held to be a continuing guarantie, and those where it has been held to be limited. In *Mason v. Pritchard* the words are, "for any goods he hath or may supply *W. P.* with, to the amount of 100*l.*" The meaning seems to be, not to limit the liability to the extent of the payment of 100*l.*, so that such liability should not continue after the time when that sum should have been paid, but

that the party giving the guarantie was willing, if not called on for more, to be answerable to that extent at any time. In *Merle v. Wells* the words were, "for any debt he may contract for his business as a jeweller, not exceeding 100*l.*, after this date." These words point out the extent to which the surety is willing to go in paying debts contracted for goods for the carrying on of the business. *Hargreave v. Smea* is the last case applicable. Its words were, "I guarantee the payment of goods, to be delivered in umbrellas and parasols, to J. and E. A. S., according to the custom of their trading with you, in the sum of 200*l.*" The meaning is not, if you will supply to the extent, but, I will be answerable to the extent; and the extent of 200*l.* is not to point out the extent to which the goods should be from time to time supplied under that guarantie, but to point out the extent to which the surety will be willing to pay on this, as a continuing guarantie.

In the present case the fair meaning of the words in the first part of this guarantie, "I will be answerable for the payment of 50*l.* for *Lerigo*," is, that I will be answerable that *Lerigo* shall pay you to the extent of 50*l.* for goods to be furnished. On the facts of the case, this might probably be the understanding between the parties; here is a young man starting in business; you may supply him with goods to the amount of 50*l.*, for his paying which I am answerable; afterwards you can see how he goes on, and whether you approve of his mode of carrying on his business, and of his payments; and you will continue to supply him or not, accordingly. The subsequent part of the guarantie does not extend this responsibility; it limits and qualifies the previous part of the contract.

This decision will be attended with beneficial consequences. It is not unreasonable to expect, from a party who is furnishing goods on the faith of a gua-

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rantie, that he will take the guarantie in terms which shall plainly and intelligibly point out to the party giving it the extent to which he expects that the liability under it is to be carried. The guarantie in this case does not clearly and intelligibly point out to the party giving it to what extent his liability is to be carried. We are therefore of opinion that the rule for entering a nonsuit should be discharged.

Rule discharged (a).

(a) And see *Kirby and others v. Duke of Marlborough*, 2 M. & S. 18; *Hassell v. Long*, *ibid.* 363.

JOHN *against* JENKINS.

The plaintiff was tenant to the defendant from year to year. The defendant then, by agreement in writing, signed by both plaintiff and defendant, *lets* the farm to the plaintiff on new terms

therein stated, the rent to be fixed by valuation of two arbitrators, and sureties for its payment to be found by plaintiff. The arbitrators never fixed the amount of rent; no sureties were ever given, nor was rent ever paid after the making the agreement. Held, that though the instrument contained words of present demise, it did not operate as a lease, but only as a negotiation for a lease, which did not determine the former tenancy.

A plea in bar to an avowry stated that only 16*l.* was due for rent, and then pleaded a tender of that sum. The proof was, that only 15*l.* 16*s.* was tendered. Held, a fatal variance, though only the latter sum was proved to be due for rent.

Semble: The jury may decide on the question of fraud or not, in a removal of goods off demised premises, though it be admitted that it took place in order to avoid a distress.

REPLEVIN. Four counts for takings in four different places, the first two only being parts of the lands demised. The avowries to the first two counts were for rent in arrear, some of them stating the demise to have been at the annual rent of 71*l.* 15*s.* reserved yearly, and others at a similar rent, payable half yearly. The avowries to the third and last counts stated rent to accrue due as before, and

then alleged that the goods had been fraudulently removed from the demised premises to avoid a distress for such rent (a).

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The plaintiff, as to the avowries to the first two counts, pleaded in bar, 1. *Non tenuit*. 2. *Riens in arriere*. 3. *Riens in arriere* beyond the 16*l*., and a tender of 16*l*.. Same pleas in bar to avowries to two last counts, and also traversing the fraudulent removal. The replications joined issue on all the pleas in bar, and denied the tender of 16*l*.. residue of the rent in those avowries mentioned.

About August 1827, plaintiff agreed with defendant to take his farm from the *Michaelmas* following at 7*l*.. 15*s*. per annum, as stated in the avowries, and paid one year's rent due *Michaelmas* 1828. Before Lady-day 1829, the defendant gave the plaintiff a notice to quit at *Michaelmas*, but the following agreement was afterwards made:—"An agreement made between E. Jenkins and D. Jones, about *Llettyr Nenadd* farm, from

(a) The 3d avowry was as follows:—And because the sum of 5*l*.. 13*s*. of the rent last aforesaid, on the 29th September 1829, and from thence until and at the said times when &c., was due and in arrear from the said plaintiff to the said defendant; and because the said cattle &c., in the said 3d and 4th counts mentioned, before the said times when &c., after the rent last aforesaid became due and payable, to wit, on the said 30 September 1829, were wrongfully, fraudulently, and unjustly removed and taken by the said plaintiff from and out of the messuage and lands so demised by the said defendant to the said plaintiff as last aforesaid, with intent wrongfully and unjustly to defraud the said defendant of the said last mentioned rent, and to deprive him of the benefit of distraining for the same; and also because the said last-mentioned cattle &c., were afterwards, to wit, on &c., put and placed by the said plaintiff into the said places in which &c., in the said 3d and 4th counts mentioned, defendant well avows the taking of the said last-mentioned cattle &c. in the said places in which &c., in those counts mentioned, and justly &c., at the said times when &c., the same being within 30 days next after the said fraudulent removal of the said last-mentioned cattle &c. from and out of the said last-mentioned messuage and lands, so demised as last aforesaid by the said defendant to the said plaintiff, for and in the name of a distress for the rent so being due and in arrear &c.

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year to year. He, the said *E. Jenkins*, lets the farm to *D. Jones* at the valuation of two disinterested persons to be chosen by each. *D. Jones* when leaving the farm is to leave the crop behind at the valuation of two like persons, to be chosen by each. *D. Jones* agrees to give four loads of lime to every five *Winchester's* of barley he sows in every field he lays down, and to leave the meadow land not laid down without the consent of the landlord, and to keep the houses in repair. *D. Jones* is to give two sureties to answer for the rent, and agrees to do nothing to injure *E. Jenkins* as to his lease. The above valuation is to take place in determining the rent for this year 1829, and the time to come. Dated 29 July 1829." (Signed by the plaintiff and defendant in presence of three attesting witnesses, and stamped with an agreement stamp.) The "valuers" chosen did not appoint an umpire, and disagreed, accordingly no valuation was made, no rent fixed or sureties given; the distress was on 30 September 1829, for rent due on the 29th. At the trial before *Bolland B.* at the last *Carmarthenshire* spring assizes, the plaintiff had a verdict on the issues joined on *non tenuit*, on the ground, as held by the learned judge, that the old tenancy was at all events determined by the agreement, and therefore that the avowries in which it was relied on could not be supported.

As to the issues on the tender, the sum proved to have been tendered was only 15*l.* 16*s.*, but as only that sum appeared due for rent at the time, the defendant had a verdict on them.

On the issues involving the question of fraudulent removal, the plaintiff's counsel first admitted that the removal took place by night and to avoid the distress(a), and then proceeded to ask the jury whether

(a) The removal need not be clandestine as well as fraudulent, viz. in turning over the landlord to the barren right of suing for his rent, see

they would not be of opinion that the tenant removed the goods under a belief, that as the old holding would expire under the notice to quit, and no new rent had been fixed, a distress would not be lawful^(a), and that he was therefore entitled to remove his property in order to prevent it from being wrongfully seized. The defendant's counsel answered, that the admission with which the other side set out, precluded any other topic from being left to the jury, because every removal made to avoid a distress constituted a "fraudulent" removal within 11 G. 2. c. 19. s. 1., and entitled the landlord to distrain the goods removed elsewhere within 30 days.

The learned baron left it to the jury to say, whether the plaintiff removed the goods under a belief that they were not of right distrainable by the defendant; or whether, having no doubt of the defendant's right to distrain them, he removed them with a fraudulent intention to defeat a rightful distress? The plaintiff had a verdict. The removal having taken place two days before *Michaelmas*, when the half year's rent distrained for became due, the plaintiff contended at the trial that the statute 11 G. 2. c. 19. did not extend to such a removal; but as it was afterwards found that some rent due at Lady-day was still in arrear at the time of the removal, and the verdict was for the plaintiff, that point was not argued in banc ^(b). Both par-

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Opperman v. Smith, 4 D. & R. 33; *Back v. Meats*, 5 M. & S. 200; *Stanley v. Wharton*, 9 Pri. 301; *Lyster v. Brown*, 3 D. & R. 501, contravening *Watson v. Mein*, 3 Esp. R. 15.

(a) See *Jenner v. Clegg* and Others, 2 Moody & Rob. 213; cor. *Perke J.* and *Bolland B.* in C. P. at Lancaster.

(b) It was contended for the defendant that the statute meant not fraud generally, but fraud with reference to the particular act of the removal of distress. Bayley B. Suppose a tenant to have on the premises valuable pictures, which he, being of undoubted solvency *aliunde*, removes before the rent becomes due, would the jury be bound to treat that as a fraudulent removal by the statute, so as to make him liable to pay double the value of the pictures under 11 G. 2. c. 19. s. 3.?

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ties had leave to move to enter verdicts for themselves on the issues respectively found against them.

In *Easter* term, a rule was obtained on behalf of the defendant to enter a verdict for him on all the issues, and another rule was obtained by the plaintiff for entering a verdict on the issues joined on the pleas of tender.

Campbell and *Whitcombe* for the plaintiff, now supported the last rule. As to the tender, the gist of the pleadings is, that he had tendered all the rent really due. The evidence was, that the sum tendered covered the rent so due. That proof substantially satisfied the averments, and the sums laid are immaterial. In showing cause against the defendant's rule they said, the issues on *non tenuit* were properly disposed of, for the first tenancy was surrendered by operation of law, when the new tenancy was substituted in *July* 1829, by written agreement; and that the question of fraud on the removal was a matter proper to be left to the jury.

John Evans and *E. V. Williams* for the defendant. 1st, The variance between the tender pleaded, and that proved, is fatal. 2dly, The instrument dated in *July* 1829, is either a lease or an agreement for a lease. If it is a lease, it could not be evidence for want of a proper stamp. If it is only an agreement, it could not determine the former tenancy, because the terms it prescribed for completing a new tenancy, never took effect. If so, the defendant ought to have the verdict on the issues of *non tenuit*. 3dly, As to the fraudulent removal, as the plaintiff admits that the removal was to avoid the distress, that was a "fraudulent" removal upon which the statute immediately attached, and the jury were relieved from finding the only fact

which could be left to them, viz. whether the removal was fraudulent?

Cur. adv. vult.

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BAYLEY B. now delivered the judgment of the court(a).—In this case there were two questions. It was an action of replevin, in which the first set of issues was joined upon pleas of *non tenuit*, and raised the question whether the plaintiff held as tenant. The second set was joined upon pleas of *riens in arriere*, and raised the question whether any rent was due; the third was upon pleas of tender of the sum of 16*l.*; and upon the fourth set of issues arising out of the last avowries, the question was, whether the goods taken had been fraudulently removed in order to avoid a distress for rent.

At the trial the jury found for the plaintiff upon the issues of *non tenuit* and *riens in arriere*, and on the fraudulent removal, and for the defendant on the issues as to the tender, and we think that the issue as to the tender was rightly found. It was arranged that the propriety of the finding should be submitted to the consideration of this court, and that this court should make such order as in their discretion they should think fit.

There was a motion on the part of the defendant, and a rule granted to show cause why the verdict found for the plaintiff upon the issues of *non tenuit*, *riens in arriere*, and the fraudulent removal, should not be set aside and a verdict entered for the defendant on those issues; and there was also a cross rule obtained by the plaintiff to set aside the verdict found for the defendant upon the issues as to the tender of 16*l.*, and to enter a verdict for the plaintiff upon those issues.

(a) Lord Lyndhurst heard the arguments, but was sitting in equity on the day this judgment was delivered.

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The question upon the latter rule is easily disposed of. The pleas in bar to the avowries allege a tender of the sum of 16*l.*, but it is incumbent upon a party pleading a tender to be accurate in his plea, and to prove a tender to the full amount stated; then as the evidence made out a tender of 15*l.* 16*s.* only, the verdict was rightly found.

The next question is, whether the issues upon the *non tenuit* were rightly found, which question depends in effect upon the agreement of *July* 1829; because there is no doubt that the plaintiff held the premises of the defendant on such terms as corresponded with some of the avowries in answer to the first two counts, unless the terms of his former tenancy were altered by that agreement. Part of the rent claimed was due at Lady-day 1829, and the residue in *September* 1829. No doubt the plaintiff was bound by the terms of the original tenancy, unless he was extricated by the agreement of the 29th of *July* 1829. The declaration contained four counts, two describing the seizure upon the demised premises, and the other two off the demised premises; and, what is singular and somewhat irregular, the plaintiff complained of seizing the same goods on and off the premises. The question, however, is, whether the defendant is entitled to have a *retorno habendo* awarded in respect of the seizure either on or off the demised premises, and if he be so entitled, the plaintiff's having made a double claim cannot prejudice the defendant. If the tenancy is made out according to any of the avowries in answer to the counts which charge a taking on the demised premises, the defendant will be entitled to a return of the goods.

Now it being clear that previously to *July* 1829, the plaintiff had held the premises upon the terms set out in some of the avowries, we come to the question whether those terms were altered. On consideration we

are all of opinion, that the terms of the original tenancy were never altered, but that the plaintiff continued to hold up to *September 1829*, upon the same terms as he had held from *September 1827*. An objection was taken to the reading of the document, by which it was contended that these terms were altered, because it was said to be a lease. If it had been a lease the objection would have been valid, as it bore only an agreement stamp. It is then a question whether it amounts to a lease or an agreement; for if it is an agreement only, and not carried into effect, it leaves things in *statu quo*. It begins with the words "An agreement;" but if, looking at its contents, we should find it to be a lease, the mere introduction of the word 'agreement' would not make it an agreement only. "An agreement &c., about *Llettyr Nenadd* farm from year to year,"—he, the said *Esau Jenkins*, lets this farm to *David Jones*. These are words of present demise; but we must look at the residue of the paper to see if this is an actual demise or substantially only an agreement, "at the valuation of two disinterested persons to be chosen by each of them." There is to be a valuation before it can operate as a lease. Then comes this provision, which is very important, and in my mind shows that it was never intended to operate as a lease at all events, but to operate as an agreement only;—" *David Jones* is to give two sureties to answer for the rent;" and then comes the provision that the valuation is to determine the rent for the year 1829, and for the time to come. It seems to me then that this was a negotiation for a lease only, and was not to operate as a lease, except there was a valuation of the rent, and except, after that had taken place, security should be given for that rent by two sureties, on the part of the plaintiff. In point of fact there was no valuation, and no sureties were given; and instead of continuing to hold

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as tenant, the plaintiff quitted the farm and removed his goods. If we were to look at this as if it had been carried into effect, it would vary the rent for the year 1829, as well as the succeeding years; but as it was not carried into effect, the agreement fell to the ground in the same manner as if there had been no such agreement, and the plaintiff continued tenant upon the same terms of holding as before. We therefore think that upon the pleas of *non tenuit* and *riens in arrere*, to some one of the avowries applicable to the terms of the original tenancy, there ought to be a verdict for the avowant. Upon the other question of the fraudulent removal, the Lord Chief Baron and my brother *Bolland* agree with me in thinking that it was a question for the jury, and that they were justified in their finding; my brother *Vaughan* thinks that he should have drawn a different conclusion. For myself I think we should not be justified in sending it again to a jury. I think it would be a waste of expense to send the case down again for trial on these issues. It is very clear that upon two of the counts the avowant is entitled to succeed, and we are therefore of opinion that he should be at liberty to enter a verdict upon any one of the avowries he may think fit, upon the issues of *non tenuit* and *riens in arrere*; and that the verdict found for him upon the plea of tender should stand.

Rule accordingly.

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DOE *d.* MORGAN MORGAN *against* MARY MORGAN.

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**EJECTMENT** tried at the last *Carmarthenshire* assizes, before *Alderson J.* to recover a house and garden in the parish of *Mothvey* in that county, first devised in the following will.

*Evan Morgan*, maternal uncle of the lessor of the plaintiff, being seised in fee of several houses and gardens in that parish, by will, dated 4th Feb. 1816, devised as follows:—

“ I give unto my dear wife, *Elinor Morgan*, the part of my house and the part of my garden where *Morgan David Morgan* and *Elizabeth Walter* dwells, unto her during her natural life, and after her decease to my nephew, *Morgan Morgan*, and his right heirs. Also I give and bequeath unto my nephew, *Morgan Morgan*, of the village of *Mothvey*, the part where I dwell, and likewise the part of my garden, which I do now occupy, to him and his right heirs after my decease. Also the house in my yard I give to the *above said Morgan Morgan* after my decease. Also I order *the above Morgan Morgan* to pay unto my sister *Gwen Price*, of the parish of *C.* the sum of 2*l.* a year and every year for the term of five years from the above said houses, and in default of payment that she is authorized to levy and distress for the same every half year on what I bequeathed to *the said Morgan Morgan* after my decease. Also I give my nephew, *Benjamin Morgan*, that part of my house and garden where he dwells; unto him and his right heirs after my decease.”


The testator died soon after the date of his will, leaving two nephews, named *Morgan Morgan*, one his sister's son, the lessor of the plaintiff, who lived at

By a will premises were devised to *Elinor Morgan*, the testator's wife, for life, and after her decease to my nephew *Morgan Morgan*, and his right heirs. Then followed,  
“ Also I give and bequeath unto my nephew, *Morgan M. of the village of Mothvey*, (other premises described in the will) to him and his right heirs after my decease.”

Testator had two nephews, named *Morgan Morgan*, one living at *Mothvey*, where the testator lived, the other at *Merthyr Tydfil*.

The proof of that fact was held at nisi prius to raise a latent ambiguity, which might be explained by admitting parol evidence of the declarations of testa-

tor at the time of making his will; and the court refused to disturb the verdict.

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*Merthyr Tidfyl* in *Glamorganshire*, and the other the eldest son of testator's only brother, *Benjamin Morgan*, deceased, and who lived at *Mothvey*, and was testator's heir at law. He also left a third nephew, *Benjamin Morgan*, the younger brother of the last named *Morgan Morgan*.

After the death of testator, his widow *Elinor* took possession of the premises devised to her, as did *Morgan Morgan*, of *Mothvey*, of the rest of the devised property, except what was devised to *Benj. Morgan*. This *Morgan Morgan*, of *Mothvey*, died in 1813 without children, and by his will devised all his property to his wife, the defendant, who took possession thereof at his death, and also of the part of the original testator's house and garden devised to *Elinor Morgan* for life, at the death of the said *Elinor*; thus obtaining all the property first devised, except *Benj. Morgan's* share.

At the trial the defendant contended, that upon the above state of facts as connected with the will, and which appeared on cross-examining the witnesses on the part of the plaintiff, a latent ambiguity was raised, to explain which parol evidence was admissible.

The learned judge assented, and received evidence of *Evan Morgan's* declarations at the time of making his will. The defendant had a verdict.

*John Evans* moved for a new trial. No ambiguity appeared on the face of the will, and therefore extrinsic evidence was unnecessary, and, if unnecessary, inadmissible. The will itself, by giving to "*Morgan Morgan* of *Mothvey*," through whom the defendant claims, certain premises, and by giving to *Morgan Morgan*, without further description, through whom the lessor of the plaintiff claims, other premises, decides that the

testator meant to distinguish between the two nephews. If so, there were distinct objects of the testator's bounty satisfying the terms of the will. *Doe v. Westlake (a)*.

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Lord LYNTHURST C. B.—The whole depends on the point whether the matter is clear on the face of the will. If it is not, the ambiguity arises from evidence *dehors* the will, and the question would be, whether the parol evidence was properly admissible. If it is, the description in the will would of course decide the matter.

The *Court*, after conferring with Mr. Justice Alderson, refused the rule (*b*).

(a) 4 B. & Ald. 57.

(b) See *Doe d. Osenden v. Chichester*, 4 Dow's R. (Dom. Proc.) 65; S. C. 3 Taunt. 147; *Thomas v. Thomas*, 6 T. R. 671; *Jones v. Newman*, 1 Bla. R. 60; *Abbot v. Massie*, 3 Ves. 148; *Andrews v. Dobson*, 1 Cox's Ch. Cas. 425.

### BRYAN *against* PHILLIPS.

THIS case, tried at the last *Leicestershire* assizes before Vaughan B. was assumpsit, with plea of general issue and a tender of 12*l.* 10*s.* Verdict for the defendant on the tender, and for the plaintiff on the general issue, damages 19*l.* 10*s.*

After a verdict for less than 20*l.* a new trial is only granted where it can be granted without costs, *e. g.* for misdirection, &c. and not where it could only be granted on payment of costs, *e. g.* for a verdict against evidence.

*Adams* Serjt. moved for a new trial, as for a verdict against evidence. He said the verdict was in fact for the plaintiff for 32*l.* the aggregate of the two sums, and therefore not within the rule against granting a new trial where the verdict is under 20*l.*

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Lord LYNDHURST C.B.—The only question is, whether is a subject of contest under 20*l.* value to be recovered in this manner? For the 12*l.* 10*s.* being paid into court, the plaintiff was entitled to that at all events, and the defendant will only be compelled by this verdict to pay a sum of 19*l.* 10*s.* more than he admits he ought to pay. The latter sum then is the whole amount in question. The rule is, that a new trial will not be granted where the verdict is for less than 20*l.* unless they can grant it without costs, as, for example, for misdirection. The principle of the rule is, that if there was no misdirection, the rule could only be granted on payment of costs, which is considered to render further contest not worth pursuing.

Rule refused (a).

(a) See *Young v. Harris*, 2 Tyrw. 167.

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BAKER *against* WILLS.

An affidavit to hold to bail for debts due on several accounts, on which the defendant is arrested for the aggregate of all the sums due, is bad *in toto*, if bad as to any one of the debts stated, and defendant will be discharged.

THE affidavit to hold to bail stated the defendant to be indebted to the plaintiff in the sum of 609*l.* 3*s.* in manner following, that is to say, in the sum of 500*l.* on the bond of the said defendant, bearing date 18th Feb. 1829, in the penal sum of 1000*l.*, for securing to plaintiff 500*l.* and interest, payable at a certain day then past; and in the further sum of 50*l.* upon a certain mortgage or conditional surrender dated on or about 12th Dec. 1829, and made by defendant to the use of the plaintiff; and in the further sum of 10*l.* for the principal due on a certain promissory note of hand drawn by defendant, payable to plaintiff at a certain day then past; and also in the further sum of 44*l.* 9*s.* 6*d.*



for interest due on the said sums of 500*l.* 50*l.* and 10*l.*; and also in the sum of 3*l.* 7*s.* 6*d.* for money paid, laid out, and expended by plaintiff for defendant, and at his request; also in the further sum of 1*l.* 6*s.* for goods sold and delivered by plaintiff to defendant, and at his request; which several sums of &c. made in the whole the said sum of 609*l.* 3*s.*

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*Platt* obtained a rule for discharging the defendant out of custody on entering a common appearance, on the ground that the affidavit was in part defective, in not showing the 50*l.* secured by the mortgage was due and unpaid.

*Thesiger* showed cause.

LORD LYNTHURST C.B.—No case having been cited to show that where an affidavit to hold to bail is bad as to part, it may be held good for the rest, our safest course will be to make the rule absolute, the defendant undertaking to bring no action.

BAYLEY B.—In a case in last *Hilary* term (a), where a defendant was arrested for the aggregate amount of three promissory notes, on an affidavit bad as to two, but good as to the third for a bailable amount, we discharged him.

*Per Curiam*.—Rule absolute, on the terms mentioned by Lord *Lyndhurst*.

(a) *Kirk v. Almond*, 3 Tyrw. 316.

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FISHER and Others *against* BEGREZ.

In order to exonerate a sheriff from returning a *fi. fa.* on the ground that the defendant is privileged as domestic servant of a foreign minister under 7 Ann. c. 12. s. 5. his acts of attendance on, and actual *bonâ fide* service of, the ambassador must be clearly shown.

*Quere*, what goods of a person actually privileged would be protected from execution?

*Semble*, that a chorister *bonâ fide* hired and paid by an ambassador to assist in the Roman Catholic ritual in his chapel for himself and suite, and attending there to do that service, is within 7 Ann. c. 12.

**HOLT** moved for a rule to show cause why the rule served on the sheriff of *Middlesex* to return the *fi. fa.* herein should not be quashed, and why the sheriff should not be discharged from the execution of it, on the ground that the defendant claimed privilege under 7 Ann. c. 12. as a domestic servant of the *Bavarian* minister resident at this court.

The affidavit in support of the motion was sworn by the sheriff's officer, and after reciting the delivery of the writ to the sheriff on the 15th of *June*, and of the warrant to the deponent, stated, that having been informed of the defendant's claim of privilege, he searched at the office of the sheriff of *Middlesex*, the list of persons entitled to the privilege of ambassadors and their servants (a), sent by Lord *Palmerston*, one of the principal secretaries of state, to the sheriffs of *London*, and finding therein the name of the defendant as a chorister, entitled to the privileges of his *Bavarian* majesty's legation at the court of *Great Britain*, he forbore to execute the warrant. That the defendant's name was in a similar list in *April* 1828, as appeared by a letter of Lord *Dudley*, then secretary of state, preserved in the sheriff's office, nor had the name ever been removed from either list. The deponent had tried to discover whether the defendant was a trader within the bankrupt laws, but verily believed he was not. The deponent also swore to his belief that defendant was not a *British* born subject, but *bonâ fide* attached to the *Bavarian* embassy, and that he acts and officiates as a chorister in the chapel of the *Bava-*

(a) *Viz.* the '*Nomenclatura comitum.*' See 3 Burr. 1479; 1 Wils. 20; 3 T. R. 80.

rian minister at this time, and that on *Sunday* last, *Nov. 4*, he assisted in the performance of divine service there.

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*Follett* showed cause on affidavits that the defendant was a native and subject of *France*, not of *Bavaria*; that having come to *England* in 1814, he had since acted here as public singer and musical teacher, publisher and composer, and had sold his own musical works: that on inquiry the *Bavarian* minister had disclaimed any knowledge of him. The defendant makes no affidavit, and the decisions show that this writ should not be quashed at the instance of the sheriff. First, the affidavits do not show the defendant to be *bonâ fide* a domestic servant within 7 *Ann. c. 12. s. 3.*, or if he was, the nature of his duties, and the services he actually performs to the minister, should have been stated. Secondly, if he was a domestic servant, the statute would not protect all his goods, unless their nature and locality be shown, and in what manner they were conducive to the minister's service.

On the first point, the defendant relies on his connexion with the embassy by acting as chorister at the *Bavarian* chapel in *Warwick-street, Golden-square*, at a considerable distance from the minister's house. That does not show that the nature of his employment requires attendance at the minister's house for actual service there, like the *English* secretary to an ambassador, *Evans v. Higgs* (a). Though "domestic servant" in the statute is not now construed to require lying in the house or residence there, yet the doing actual service is requisite, *Widmore v. Alvarez* (b). In *Triquet v. Bath* (c) the privilege claimed by the defendant as domestic servant of the *Bavarian* minister was established by affi-

(a) *Str.* 797.(b) *Str.* 796.(c) 3 *Burr.* 1478.

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davits of his appointment as *English* secretary, and of his actual attendance, and doing specified acts of service at the minister's house. In *Lockwood v. Dr. Coysgarne* (a) it was sought to set aside an execution on affidavits that defendant was hired to the *Bavarian* minister as his physician, at 40*l.* salary, and prescribed for his family only. But it appearing that the view of taking the defendant into the service was collusive, in order to protect him, the execution stood, *Seacomb v. Bowlney* (b). A chaplain to the *Hungarian* resident here was refused the privilege, because the affidavit did not state that he did any duty in the house. In *Carolino's* case (c), a person retained as interpreter to the *Tripolitan* ambassador was rejected on the same ground; *Wright, J.* adding, it did not appear that the defendant had done any one act as a "domestic servant," and that lying in the house was formerly thought necessary. *Darling v. Atkins* (d) states the reason for the present contrary holding to be, that many houses are not large enough to contain and lodge all the servants of some ambassadors; but the protection as *English* secretary of the *Bavarian* envoy was there refused to a purser in our navy who showed no acts of domestic service. The sheriff cannot refuse to return the writ, on the ground that the defendant's name is registered in his office; but must decide at his peril the question, whether he is or is not the domestic servant he claims to be; *Delvalle v. Plomer* (e).

Secondly, the sheriff, who here applies to be exonerated from executing final process against the defendant, should have gone on to show how the goods were protected. [*Bayley B.* Even if the defend-

(a) 3 Burr. 1078.

(b) 1 Wils. 20.

(c) 1 Wils. 78.

(d) 3 Wils. 33.

(e) 3 Camp. 47. See *Hopkins v. De Roberck*, 3 T. R. 80, as to the list.

ant were a domestic servant, he might have goods which might be taken.] The act is only declaratory of the law of nations (a) for the protection of an ambassador's dignity and personal comfort; and in order to prevent inconvenience to him, the law will not suffer the goods of his domestic servants, while in his house, to be taken in execution. Here no locality of the goods sought to be protected being shown, they will not be protected in places not connected with the convenience of the foreign minister. In *Novello v. Too-good* (b) the *English* born chorister of the *Portuguese* ambassador, who had sung at divine service in the chapel annexed to the embassy house for 25 years, claimed privilege from a distress for poor-rates made on his goods in a house of his own, part of which he let in lodgings; but the court held, that the goods not being necessary to the ambassador's service or convenience, might be distrained. *Abbott C. J.* there made a distinction between the taking the person and the goods of the defendant; and *Bayley J.* added, this is not the case of an arrest of the person of an ambassador's servant, nor are the goods seized such as were necessary in a residence of that description which a *bonâ fide* service to the ambassador might have required.

Sdly. The defendant was a trader getting his livelihood as a seller of his own musical works before he was appointed a chorister in 1828, and was therefore at that time a trader "putting himself into the service of an ambassador" within the exception in s. 5.

*Holt* in support of the rule. No collusion is shown, and the sheriff is entitled to protection if the case is within the policy of 7 *Ann.* c. 12. Now, first the de-

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(a) See, per *Lord Mansfield*, 3 *Barr.* 1480; *Blackstone's* argument, *id.* 1479.

(b) 1 *B. & Cr.* 554.


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defendant need not be shown to be literally the "domestic servant" of a foreign minister, for the words domestic and domestic servant, are only used by way of example of persons protected by the law of nations, which is part of the law of this country, and is only explained and affirmed by the statute; *Hopkins v. De Robeck* (a). There the court held, that the defendant was entitled to protection, though his name was not registered. The defendant's sureties are connected with the religion of the foreign minister, and therefore should be protected. See per Lord *Tenterden* C. J. in *Novello v. Toogood*. [*Bayley* B. If your affidavit showed that the defendant was employed by the *Bavarian* minister as a domestic servant to sing in his chapel, that might have sufficed on his own application.] This application does not require affidavits stating specific acts of service, as if it was made by the defendant; for sheriff's warrants warn officers against arresting privileged persons. This defendant is on the list of those persons not furnished by the ambassador, but by the *English* secretaries of state. [*Gurney* B. The sheriff is bound to show that the defendant is a domestic servant of the *Bavarian* minister. Now without affirming a service in any place soever, you only show that the defendant at present officiates as a chorister, and did officiate as such on a day named. That is quite consistent with his never having been a domestic servant. *Vaughan* B. The defendant's act of singing takes place after the sheriff is called on to return the writ. *Bayley* B. No question appears to have been asked by the sheriff by letter to the *Bavarian* minister, but it is only said that he could not be personally seen when called on by the officer.] Is the sheriff bound to make inquiries whether he really is a chorister and officiates, as well as whether he is a trader?

(a) 3 T. R. 80; and see 187, note (a).

2dly. *Novello v. Toogood* is the first case in which any distinction is taken as between the protection of goods and that of the person (a).

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BAYLEY B. (b)—We are all of opinion that this rule must be discharged. It is therefore unnecessary to pursue further the distinction which has been raised between the protection afforded to the person and the goods of a person privileged by the act of *Anne*, or to decide whether the person of this defendant is or is not protected by the facts here stated. There is no doubt that when final process is put into a sheriff's hands, he is under a strict legal necessity to execute it, and to make a return. If circumstances exist, which by rendering a return improper, would exonerate him from making such execution, the regular course is to make a return of those circumstances with the writ. That might have been done in this case, if the sheriff considered the defendant's goods to be protected. But we are called on to stop the proceedings of the plaintiff *in limine*, by quashing the rule to return the writ, and also to relieve the sheriff. Before we could interpose in that manner the affidavits should have stated matter sufficient to show that we should exercise a sound discretion in adopting the course suggested. But if circumstances of adequate cogency are not stated, the court should leave the sheriff to return the writ. Now in this instance the sheriff founds his application on the statute of *Anne*, and says that the process should not be executed against the defendant, because he was the domestic servant of the *Bavarian* minister. Now 7 *Ann.* c. 12. s. 3. enacts, "that all writs and processes that shall at any time hereafter be sued forth,

(a) The court here intimated that they had no doubt on the first point, and that it was therefore unnecessary to argue the second.

(b) Lord Lyndhurst was in equity.

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or prosecuted, whereby the person of any ambassador &c. or the domestic or domestic servant of any such ambassador &c. may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be null and void." That act gives protection to ambassadors or their domestic servants; then the affidavits in support of this motion should have shown that he is the domestic servant of the *Bavarian* minister within that act, and the acts of service which prove it. To establish himself to be such domestic servant, it is not necessary to show that the defendant lives in the house of the embassy; and if it was shown that he was a person paid by the *Bavarian* minister, who might therefore be entitled to require him to attend from time to time, and assist in performing religious service at a chapel used by the embassy, I should consider he might have a right to enjoy some of the privileges given to a domestic servant by the act. But we ought then to be satisfied that this defendant is a domestic servant of the foreign minister within that act, before we exempt him from his liability at common law. Now the lists sent by the successive secretaries of state to the sheriff's office, do not prove him to be a domestic servant within that act, but only that he was described to him as such in 1828 and 1831, when his name was registered. But if those certificates could be acted on here, they would only show that the defendant was then represented to be a domestic servant; but whether he remained such at the time of the delivery of this *fi. fa.* to the sheriff, would be to be ascertained by other proof. There is clearly nothing to show that he was, or continued to be a chorister in the service of the *Bavarian* minister. Then the sheriff who applies in this extraordinary way should satisfy us, not only that the defendant was certified to be such domestic servant, but really was so



down to the present time. Now on that subject, this affidavit is meagre in the extreme, and falls short of what is requisite. It states inquiries by the officer whether the defendant was a trader, but not whether he inquired of the servants of the *Bavarian* minister at his house, or at his chapel, whether the defendant acted as domestic servant in the first or as chorister in the latter. No written communication to the *Bavarian* minister that the defendant claimed privilege from execution, and inquiring whether the defendant filled the character he claimed or not, appears. The defendant may be "attached to the *Bavarian* embassy," without having acted as a chorister in the *Bavarian* chapel in that minister's service. This "acting and officiating as a chorister at this time" may mean his singing at the chapel on a *Sunday*, and not before the swearing the affidavit, and not at any prior period, when the sheriff was bound to execute this writ. I am therefore of opinion, that the sheriff has failed in laying any ground for the indulgence he prays.

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VAUGHAN B.—This writ of execution came to the sheriff on the 15th *June*, but he takes no step on it till the present term, when being ruled to return it, he interposes this motion, grounded on an affidavit of an act of singing by the defendant in the interval since the sheriff was ruled to return the writ. This application by a sheriff to be discharged from executing the process by reason of the defendant's privilege, is not in the ordinary course. Then we should see most clearly that the case is one where an application is made on behalf of a domestic servant, performing some acts of a domestic nature, though not resident in the house, and which would show that the execution of the writ would clearly be contrary to the act. What is there here to satisfy us that he is the domestic servant of the *Bavarian*

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minister? Nothing but the belief of the officer that the defendant officiates as chorister, and as such sung at a period after the writ was returnable, at a chapel called the *Bavarian* chapel. Nothing is stated as to any connection of the *Bavarian* minister with that chapel, or that he pays the defendant as one of the choir. That act of singing might have been by collusion with the officer who makes the affidavit.

BOLLAND B.—It is not necessary in this case to decide whether a chorister really attached to the chapel of a foreign minister of the Roman Catholic religion, be within the statute of *Anne*, a domestic servant; though I should think that such a person attending at the chapel, and as a part of his duty, assisting in the performance of religious services there for the ambassador and suite, was protected. But this affidavit only states that the defendant officiated on one occasion, and that he now officiates as a chorister. Now though some ambassadors have themselves musicians for their choir, it is known that the singing is executed by others employed at weekly and daily pay. But it is said that the list sent by the secretaries of state to the sheriff's office, accredits the defendant as a privileged person, and throws it on the plaintiff to show he is not. However, that list is not an estoppel of all inquiry *dehors* its contents; its object was to give the sheriff notice of the names registered, so as to protect him from attachment if he executed process against a privileged person, whose name did not appear in it. The sheriff makes out no title to the indulgence or interference of this court.

GURNEY B.—The sheriff assigns as a reason for not executing this writ, that in the list sent to him from the secretary of state, he finds the defendant certified

to be a privileged person. Then the only question is, whether that list alone shall prevent the judgment creditor from getting the execution to which he is entitled by law? For I am clearly of opinion that this affidavit shows nothing like a case of domestic service by the defendant, so as to entitle him to the privilege set up on that account.

Rule discharged.

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BECKE Gent. one &c. *against* WELLS.

**A**SSUMPSIT for an attorney's bill. At the trial at the *Westminster* sittings before Gurney B. it appeared, that the business was done at the *Middlesex* court of requests, engrafted on the county court by 23 G. 2. c. 33. No signed bill was proved to have been delivered to the defendant. The items of demand were for conferences, letters, &c. and attending the hearing of summonses at the court of requests by direction of the defendant. Nonsuit, with leave to move to enter a verdict for 2*l.* 14*s.* 8*d.* A rule having been obtained accordingly,

An attorney may recover for business done in the *Middlesex* court of requests, without delivering a bill in pursuance of 2 G. 2. c. 23. s. 23.

*Gunning* showed cause. This case turns not on 3 G. 1. c. 7. s. 1, which has always been held as only applying to business done in the superior courts, *Buckwood v. Fanshaw* (a); but on 2 G. 2. c. 23. s. 23., so that *Raynal v. Smith* (b) does not apply. 2 G. 2. c. 23. has been always liberally construed in favour of clients, *Winter v. Payne* (c), *Smith v. Taylor* (d), *Watt v.*

(a) Carthew, 147.

(b) 2 B. & Adol. 469; 2 M. & M. 85, S. C.

(c) 6 T. R. 646; and see 4 B. & C. 367, per Lord Tenterden.

(d) 7 Bing. 262.

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Collins (a). Thus in *Ex parte Williams* (b), and *Clarke v. Donovan* (c), adhered to in *Sylvester v. Webster* (d), a bill for business done wholly at quarter sessions, were held within this act, after a contrary opinion had prevailed. In *Smith v. Wattleworth* (e), it was held, that an attorney of a superior court could not sue for work done in the insolvent court without first delivering a signed bill; and Lord Tenterden considered that that business having been done at law by an attorney of the King's Bench, afforded an answer to the argument, that persons might be admitted to practice in the insolvent court, whose bills, they not being attorneys any where else, would not be within 2 G. 2. c. 23. or taxable, except in that court. But *Rex v. Flint* (f), is a stronger case than this, and directly in point. The entry of a plaint and suing out of process in a county court was there held to be "business in a court of law or equity," so as to incur penalties within 12 G. 2. c. 13. By 23 G. 2. c. 33, s. 1, the county clerk and suitors of the county court of *Middlesex*, (now often called the *Middlesex* court of requests) are to decree according to equity. They may administer oaths and imprison for contempt (g). In *Lloyd v. Maund* (h), a bill for business done in a criminal suit in a *Welsh* court of great sessions, was referred to be taxed; for though the master might not know the practice as to those costs, he might tax them by calling in assistance, as well as he could tax costs in spiritual courts. [Bayley B. There was a taxing officer in the *Welsh* great sessions to whom reference might be made, but is there such a person here?] He also

(a) Ry. & M. 286.

(b) 4 T. R. 124, 496.

(c) 5 T. R. 694; 1 Esp. 137, S. C.

(d) 9 Bing. 388.

(e) 4 B. & Cr. 364.

(f) 1 B. & Cr. 254.

(g) Quære, if an attorney may be sued in that court: see Tidd, 9 ed. 960.

(h) MS. Tidd, Prac. 9 ed. 329.

cited *Sandom v. Bourn* (a), *Smith v. Taylor* (b), *Ex parte Prickett* (c), *Fearne v. Wilson* (d). *Wardle v. Nicholson* (e), does not touch the question.

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Stephen Serjt. and *Mansel* contra. This action may be supported without proof of delivery of a signed bill. For, first, this court of requests is not a court of record within 2 G. 2. c. 23.; and secondly, it has no taxing officer.

The first question turns on the construction of 2 G. 2. c. 23. s. 23., the earliest interpretation of which was, that its restrictive words only applied to business done in some court where attornies are usually admitted and sworn. Section 1 supports that view of the meaning of "the courts aforesaid" in section 23. *Aston v. Molyneux* (f), is an instance where the taxation of a bill in the *Doncaster* court of requests was refused. So in *Stephenson v. Taylor and Another* (g), *Buller J.* held that the delivery of his bill by an attorney was only necessary under 2 G. 2. c. 23., in case of business done in a court of record wherein attornies are admissible and sworn, and not in case of business done at quarter sessions. After that decision the court, in *Ex parte Williams* (h), at first refused to tax a bill for the last-mentioned business, though they afterwards acceded to such taxation in the same case, on the ground of there being several instances in which such bills had been taxed. Upon that case, which was the first departure from the former construction of the act, it may be asked whether there is any such practice here, as that of taxing bills of costs in courts of requests? *Clarke v. Donovan* (i) went further,

(a) 4 Camp. 68.

(b) 7 Bing. 262.

(c) 1 N. R. 266.

(d) 6 B. & Cr. 86.

(e) K. B. unreported.

(f) Barnes, 122.

(g) York summer assizes 1786, cor. *Buller J.*, 4 T. R. 124, n. (c).

(h) 4 T. R. 124.

(i) 5 T. R. 694.

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and decided that a signed bill must be delivered to a defendant for business done at the quarter sessions a month before commencing an action thereon. That decision went entirely on the authority of *Ex parte Williams*. Lord *Kenyon* said there was no reason for restraining the general words of the first part of the clause, which require an attorney to deliver his bill a month before commencing an action. But the wording gives a reason for construing that part of the act restrictively, viz. to the "courts *aforesaid*," those words being necessarily connected with the other parts of the statute. The only object of making the delivery of a signed bill necessary, was to give opportunity for taxation (a). *Lloyd v. Maund* is only found in *Tidd*, and when cited in *Ex parte Partridge* (b) was disregarded.

Now this court of requests is not a court of record at *Westminster*. Wherever taxation of bills incurred in other courts has been ordered by the courts of *Westminster*, the courts have been courts of record, e.g. the courts of great sessions in *Wales* and of quarter sessions, to which may be added that of insolvent debtors, for some purposes of that act. And though it was held in *Collins v. Nicholson* (c), that a bill for business done, in taking out a commission of bankrupt, was taxable as a proceeding in equity, that has been overruled in this court, *Crowder v. Davies* (d). The act 2 G. 2. c. 23. only applies to "fees, charges, or disbursements at law or in equity; but this court of requests is neither. Its functions entirely differ from those of the common law county court. It is to decide as shall be found to stand with equity and good conscience. In *Scott v. Bye* (e) the court of Common Pleas held, that proceedings in a court of requests, where that arbitrary rule of decision prevailed, were

(a) See *Watson v. Postan*, ante, Vol. II. 406.

(c) 2 Taunt. 321.

(d) 3 Y. & J. 413.

(b) 2 Merivale, 500.

(e) 2 Bing. 344.

not proceedings at law on which a writ of false judgment would lie. Again, in *Tingle v. Roston* (a), an *accedas ad curiam* was set aside, on the ground that it appeared from its return, that the proceedings in the court of requests below were of an equitable nature.

2dly. No taxing officer appears to exist in this court of requests to whom the items of charge could have been referred for taxation. Then the plaintiff is entitled to a verdict; see *per* Lord *Tenterden* in *Burton v. Chatterton* (b). In the courts of great sessions in *Wales*, of quarter sessions, and insolvent debtors, such officers existed. In courts where no such officers exist, orders for taxation under 2 G. 2. c. 23. s. 23. have been refused. *Williams v. Odell* (c) is directly in point. It there appeared that there was no practice for taxation of bills for business done in appeals in the house of lords; and this court accordingly refused to refer such a bill for taxation, because there was no criterion by which their officer could be enabled to tax the bill, or any means to which he could resort for assistance. *Ex parte Dann* (d) shows that a bill for proceedings before the chancellor as visitor of a royal charitable foundation is not taxable.

BAYLEY B.—My present impression is, that this rule ought to be made absolute. But as it is stated that a somewhat similar case is pending in another court of *Westminster Hall*, we shall postpone the execution in this case, in order to give it a greater degree of consideration, if we should find that another court entertains a different opinion. I have at present no doubt on the point. My judgment rests on this being a proceeding in a court in which there is no taxing officer. The question arises on 2 G. 2. c. 23.

(a) 2 Bing. 463.

(c) 4 Price, 279.

(b) 3 B. & Ald. 487.

(d) 9 Vesey J. 547.

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s. 23., which provides that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, &c. at law or in equity, until the expiration of one month after he shall have delivered his bill &c.; and further, that on application of the party chargeable by such bill &c. unto the Lord Chancellor, Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted, &c. it shall be lawful &c., for the Lord Chancellor, Master of the Rolls, or the said courts, or a judge or baron of the said courts respectively, to refer the bill for taxation by 'the proper officer of such court.' By the wording of that act the order to tax is to be made by the court in which the business is done, or by a judge thereof. There are cases in which a bill has been referred to be taxed by order of a superior court, though the business has been done in an inferior court; but no case has been cited in which such a reference has been made to a court where there is no taxing officer. For the words are, "to be taxed and settled by the proper officer of such court."

When the question as to taxing a bill for business done at the quarter sessions, came before the court of King's Bench in *Ex parte Williams*, that court was at first of opinion that the bill could not be taxed, because they thought that there was no officer proper to tax it, and they only altered their opinion because their officer was in the habit of taxing such bills.

In the superior courts of *Westminster*, in the insolvent court, and formerly in the great sessions of *Wales*, there were taxing officers, but in the house of lords there is none. Accordingly, bills for business done in the former courts are referred for taxation, but not in the latter. The distinction therefore, in my opinion,

lies between cases where business was done in courts having a taxing officer, and in courts not having a taxing officer. If the court has no taxing officer, the business is not to be considered as done at law or equity within the meaning of the provisions of the statute.

Now this bill is principally composed of charges for attendances, some out of the court of requests, and some in it, but not as an attorney, for no attorneys are admitted or practising as such in those courts. Persons filling that character are entitled to be paid for their time given to a client, whether in a court of law or any other court. I apprehend an attorney has no more right to stand in the place of a party to a suit in a court of requests, than a person who is not an attorney can do in this court; but any friend of the party may as such come forward on his behalf. Nor are any fees contemplated or payable by this act of 23 G. 2. to attorneys; and the trifling amount of fees allowed to the officers of the court by the table set forth in s. 12 of the act, shows the business to be of that small kind in which no attorneys could be expected to be employed. If an attorney is employed on behalf of a party, and is suffered by the court so to act, there is nothing to regulate the amount of his fees, and he can only recover for his attendance on a *quantum meruit, viz.* by means of a jury, not according to the standard established by a taxing officer, for there is no such officer in a court of requests. Nor could the officer of this court adjudge the amount, because there are no fees in a court of requests on which to adjudicate. If there are no fees, it seems to me not to be a court within this act. Then the sum to be recovered by the plaintiff is not a fee, but a reasonable compensation to the party for attending, not as an attorney, but as a substitute for the defendant. I am of opinion that the delivery of this bill

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was not requisite under the statute, and that this rule must be made absolute.

VAUGHAN B.—The question arises purely on the construction of section 23 of 2 G. 2. c. 23. The words are “fees, charges or disbursements at law or in equity.” The object plainly is to give the party an opportunity of having his attorney’s bill taxed by the proper officer; that officer is mentioned in terms in the clause, which, therefore, necessarily imports his existence in the courts contemplated. Now as in this court of requests, there is no such taxing officer, nor in practice has any officer of a superior court been called on to tax such a bill as this, those facts, in my opinion, decide this case. One object of these courts of requests was to exclude attornies from practising, for the cases are to be decided according to the rules of equity and good conscience, and not by ordinary course of law. Now the words “law and equity” in 2 G. 2. c. 23. s. 23. mean law and equity as administered in the superior courts here. I agree with my brother *Stephen* that some of the decisions have already departed from the words of the act; but there is no practice here as there was in *Ex parte Williams* to sanction such a departure. Then the jury must settle the plaintiff’s remuneration as they may think reasonable, for the charge is not in the character of an attorney. These are not fees at law or in equity within 2 G. 2. c. 23. nor is the court of requests a court within that act.

BOLLAND B.—I am of the same opinion, on the broad ground that in this court of requests there is no taxing officer, and that it is not a court of law or equity in the sense of those words, as used in the act. When Lord *Kenyon*, in *Ex parte Williams*, spoke of the

practice of K. B., that practice depended on there being a taxing officer in the court of quarter sessions.

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GURNEY B.—The circumstance of there being no taxing officer, distinguishes this case from all those cited for the defendant.

Rule absolute.

GRAHAM *against* WHICHELO (and HULL.).

ASSUMPSIT. By an agreement, dated 10 *March* 1827, between the plaintiff of the one part, and the defendants of the other part, the plaintiff agreed to let and demise to defendants a part of a certain dwelling-house, with certain rights, &c. to hold the same from the 25th *March* then instant, for the term of three years from thence next ensuing, at 210*l.* rent payable quarterly; and if the defendants should give to the plaintiff three months notice in writing for that purpose, previously to the expiration of the said term of three years, then and in that case, for and during the further term of four years, making in the whole the term of seven years from the said 25th *March*, at the yearly rent or sum of 210*l.* payable quarterly, &c. and the defendants agreed to take and rent the same premises of the plaintiff.

By agreement dated in 1827, *W.* and *H.* took premises from the plaintiff for three years, with power to claim an extension of the term to seven years. They occupied in partnership till *July* 1828, when it was dissolved, and *W.* retired into the country. However, in *January* 1829, he, in compliance with the plaintiff's desire, joined *H.*

in a notice to the plaintiff to extend the term according to the agreement. In *January* 1829 *H.* took *S.* into partnership, and continued to occupy till *September* 1831. In *February* 1829 the plaintiff authorized his attorney by letter to draw a lease to *H.* and *S.*, and gave the letter to *H.* who never delivered it, nor was such a lease executed. The plaintiff's receipts for rent purported to be from *H.* and *W.* while in partnership, from *H.* when *W.* had retired, and from *H.* and *S.* after *S.* was taken into partnership.

Held, that the original tenancy of *H.* and *W.* was not surrendered by act or operation of law, and consequently, that *W.* remained liable for the rent.

Quære, if after *nolle prosequi* entered quoad one defendant, who has pleaded bankruptcy, he is a witness for the other, to resist a prior claim against both?

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The special count of the declaration, after stating the above agreement, alleged, that after the making of the said agreement, and more than three months before the expiration of the said term of three years, the defendants did give notice in writing of their intention to hold and continue tenants of the demised premises for the further term of four years from and after the expiration of the term of three years, making in the whole the term of seven years, according to the provisions in the agreement. No occupation was averred, but the nonpayment of 105*l.* for half a year's rent due 29th September 1831, was alleged by way of breach. A count for use and occupation followed with the money counts.

Pleas, by *Whichelo*, non assumpsit; by *Hull*, his bankruptcy. *Nolle prosequi* entered as to *Hull*.

At the trial before Gurney B. at the *Middlesex* sittings in *Trinity* term, the plaintiff had a verdict for 105*l.* against *Whichelo*, subject to leave to move for a nonsuit. The following facts appeared in evidence. The defendants hired rooms in *Regent Street* of the plaintiff on the above agreement, and on 19 January 1829, *Hull* and *Whichelo*, also by the plaintiff's desire, sent the plaintiff a written notice requiring the term to be extended. The defendants proved receipts given by plaintiff for rent, as received from *Whichelo* and *Hull* till July 1828, then as received from *Hull* only, and afterwards from *Hull* and *Smart*.

Hull, who had obtained his certificate, was then called for the defendants. Objection was made to his competency as a witness, on the ground of his interest to defeat the action. The point was reserved, and the evidence admitted (*a*). He proved the dis-

(c) *Mas Iver v. Humble*, 16 East, 171; *Affalo v. Fourdriner*, 6 Bing. 306, S. P.; *Bate v. Russell*, (on 6 G. 4. c. 16.) 1 Moody & M. 332, were cited in argument in banc on the point, but no judgment being given on it, the argument is omitted.

solution of the partnership between himself and the defendant at *Midsummer* 1828; that defendant then retired from business, of which the plaintiff had notice within three months. In *January* 1829, *Hull* having taken *Smart* into partnership, they traded on the premises as *Hull* and Co. till *Smart* died and *Hull* became bankrupt in *September* 1831. After the above notice to the plaintiff requiring an extension of the lease, the plaintiff wrote the following letter directed to his attorney, and gave it to *Hull*, at his house, but it was never delivered. "Dear Sir—Messrs. *Hull* and Co. have requested me to say that they wish to have a lease prepared for the residue of the term they hold of part of my house, No. 27, they will apply to you accordingly; *the firm is now Messrs. Hull and Smart*, and I have no objection to grant their request." Signed by the plaintiff 11th *February* 1829. No lease was drawn or signed. It was contended for the defendant that his interest in the premises was surrendered by operation of law, and by the plaintiff's agreement to take *Hull* and *Smart* as new tenants, instead of *Hull* and defendant; but the learned judge thought that no new lease having been executed to *Hull* and *Smart*, the plaintiff's intention to take *Smart* as a tenant was not binding on him till plaintiff's letter was acted upon, and till *Smart* became his tenant: for otherwise he might have lost the security of the defendant without getting that of *Smart*. Verdict for the plaintiff for arrears due at *Michaelmas*, with leave to move to enter a nonsuit. A rule having been obtained accordingly,

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Hutchinson and *Butt* showed cause. The old tenancy of seven years contemplated by the original agreement, was created in the manner thereby directed. Then as no surrender of it by writing appears, it still

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exists so as to render the defendant liable on the privity of contract. For if the letter from the plaintiff is admissible in evidence, still having been written by him and kept by *Hull* without being produced till the trial, it could not operate as a surrender; at all events not without being stamped as such, *Williams v. Sawyer* (a). Nor can it operate as a new lease, or agreement for a lease, for a similar reason. There never can be a change of tenancy by operation of law without consent of all the parties (b). Here the plaintiff's letter proposing a lease to the new firm is kept by *Hull*, and *Whichelo* never sees it. Not only was there no surrender by *Whichelo*, but no new tenant is made who might be liable to the suit of the landlord.

[*Bayley B. Whichelo* never occupied after *July* 1828. Then if a new lease had been executed to *Hull* and *Smart* in 1829, there would have been a new contract with them which might have been a surrender by operation of law; but as no such lease was executed, you contend that *Whichelo* is liable on the privity of contract arising from the original agreement.]

In *Matthews v. Sawell* (c) the court felt the hardship on the old lessee, who had quitted the premises after a verbal surrender of the old tenancy; but held, that as no new tenant had become answerable to the lessor the old tenancy remained. In *Thomas v. Cook* (d) all the parties assented to the change of tenancy. The original tenant having distrained on the new occupier, the landlord interposed, took the new occupier's bill in payment of the rent due to himself, and afterwards distrained on his goods for other rent. It was held, he

(a) 3 Brod. & B. 70.

(b) See per *Holroyd J. Thomas v. Cook*, 2 B. & Ald. 122; *Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Matthews v. Sawell*, 8 Taunt. 270; per *Abbott C.J.* in *Hammerton v. Stead*, 3 B. & C. 478.

(c) 8 Taunt. 270.

(d) 2 B. & Ald. 119.

could not afterwards sue the original tenant for use and occupation. Here, if the receipts produced show the privity of estate to be destroyed, the privity of contract remains on the original agreement specially declared on. Then no occupation by the defendant was necessary (a); and as the special agreement is not under seal, *assumpsit* is the proper remedy, as covenant would have been had it been under seal (b).

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Jervis in support of the rule. The interest of *Whichelo* was ended by act and operation of law. In *Thomas v. Cook* the assent of the defendant as original tenant, to the substitution of another tenant, was presumed; the landlord having accepted of him in that capacity, and having distrained on him. The liability of that defendant was held to be ended, under facts not more cogent than the present. The plaintiff relinquished *Whichelo* as a tenant, when he gave receipts for rent to *Hull* after the partnership with *Whichelo* was dissolved, and afterwards to *Hull* and *Smart*. A jury might well infer from the latter receipts, and the letter to *Hull* and *Smart*, that the plaintiff had assented to take them as his new tenants. Then *Whichelo's* assent must be presumed, being to his advantage; *Thomas v. Cook*.

BAYLEY B.—The plaintiff's letter does not show that *Smart* as well as *Hull* undertook to become liable to the plaintiff for the residue of the term granted to *Hull* and *Whichelo*, though the plaintiff might be willing to take *Smart* as a tenant, if he would become personally liable to him for that period. This case is very plainly distinguishable from *Thomas v. Cook*.

(a) *Bull v. Sibbs*, 8 T. R. and cases collected in the notes to *Thuraby v. Plant*, 1 Saund. 141.

(b) See 1 Saund. R. 140. n. (p), last edition.

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There the lessee underlet, and the lessor accepted the under-lessee as his immediate tenant, the original lessee assenting to that arrangement; so that there was a concurrent consent by all the parties. So had it been here made out that the plaintiff *Graham* ever agreed to take some one as his tenant in substitution for the defendant *Whichelo*, and that some one else agreed to become that substitute, the principle of *Thomas v. Cook* would apply; but the point of analogy between the cases is wanting, for there was no agreement by the plaintiff to give up *Whichelo*, or by any other person to stand in his place as tenant. The original agreement was to hold the premises for three years, that term to be extended to seven years, if the tenants chose to give the plaintiff a notice to that effect. That notice was given in Jan. 1829, but before it was given, and as early as July 1828, *Whichelo* withdrew from the business and went into the country. From that time to January 1829 the rent appears to have been received as from *Hull* alone; but in that month *Whichelo*, who had ceased to be concerned with *Hull* in the trade carried on on the premises, concurs with him in giving notice to the plaintiff that they required an extension of the term. That appears to be a distinct acknowledgment by *Whichelo* that he considered himself as remaining at that time tenant to the plaintiff. What is there since that time to exonerate *Whichelo* from his liabilities as such tenant, and to put *Smart* in his place, so as to constitute a surrender of *Whichelo*'s interest by act and operation of law? The receipt for rent given by the plaintiff to *Hull* and *Smart* does not show an undertaking by the plaintiff to give up the party with whom he had before contracted, and there is no evidence to show that *Smart* contracted to be liable as tenant for the rest of the extended term for which *Whichelo* was liable; nor had he any interest to

do so. The plaintiff's letter has also been relied on, by which he showed his readiness to accept *Smart* in lieu of *Whichelo*, and to take him with *Hull* as his tenants under a new lease; but does that readiness to take them as such lessees by an instrument which, if executed, would make each of them personally liable for four years' rent, amount to giving up the original tenant, or accepting his surrender, if that instrument was never executed, and no new tenant was ever substituted? On the evidence it does not appear that the plaintiff gave up *Whichelo* and accepted *Smart* as his tenant, or that any one was put in *Whichelo's* stead as tenant. Then he remained liable.

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BOLLAND B. (a).—I have looked in vain for any thing to show that the defendant was not entitled to any benefit which might have accrued from the lease as extended. The only circumstance pressing me was the plaintiff's letter, which might have been available to make *Hull* and *Smart* his tenants, could *Whichelo* have established that its terms were acted on so as to substitute *Smart* for him according to them.

GURNEY B.—Both the parties to the original contract must concur in the new one; but one of them, the defendant *Whichelo*, has done nothing at all, and the plaintiff has only expressed his readiness to concur, in case of a particular event, viz. the execution of the lease by *Hull* and *Smart*. That has not taken place; then the plaintiff's intention was merely inchoate. The test is, could not *Whichelo* have insisted on reaping any benefit which might have accrued during the extended term?

Rule discharged (b).

(a) *Vaughan* B. was gone to chambers.

(b) See *Hamerton v. Stead*, 3 Bar. & Cr. 478.

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A notice of bail should state the residence or residences of the bail to have been at the place or places mentioned in the notice of bail, 'for (i. e. during) the last six months,' and 'within the last six months,' is incorrect. But in a case where the affidavit of justification accompanying the notice of bail stated the bail to have resided at the (same) place named in the notice "for the last six months," the defect in the notice was held cured, and the bail was allowed.

THE notice of bail stated the bail to have resided at the place in the notice "*within* the last six months.' An affidavit of justification by the bail accompanied it, stating that he had resided there '*for* the last six months.'

Butt for plaintiff. The notice of bail does not comply with *Reg. Gen. Trin. 1 W. 4.* [Vol. I. 520,] in not stating the residence of the bail to have been at the place mentioned *for*, that is, *during* the last six months.

Comyn for the bail cited *Fenton v. Warre (a)*, to show that that statement need not be made in express terms in the notice of bail, and that it was sufficient to make it in the affidavit of justification which accompanied it.

Butt. On Jan. 30, 1832, *Vaughan B.* stated that the judges had met on the subject, and thought the true sense of the rule to be, that the notice of bail should state the place or places of residence of the bail *during* the last six months, and not leave it to inference (*b*). A similar construction prevails in *K. B.*

GURNEY B.—This notice ought to have stated that the bail had resided at the single place specified all the six months: that is the intention of the rule, as appears from its requiring every residence of the bail within the last six months to be stated, if there has been more

(a) *Ante*, Vol. II. 158. *Michaelmas* 1831.

(b) *Ante*, Vol. II. 592. Acted on by court of Exchequer, 16 Jan. 1833.

than one such residence in that time. If it were held otherwise, bail might justify who had only resided there a day before giving the notice. My doubt is, whether the correctness of the affidavit of justification accompanying the notice has not cured its defect.

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And after conference with the Court, the learned Baron afterwards added,

We think that the notice is sufficient, it having been accompanied by an affidavit stating that the bail had resided *for* the whole six months.

Bail allowed without payment of costs by the plaintiff.

[See *Reg. Gen. Trin.* 1 W. 4. No. 3, Vol. I. 521.]

GODDARD *against* HODGES.

ASSUMPSIT against the chairman of the committee of a company formed for building a bridge, by the solicitor to the company, to recover money paid for advertising and taking a journey in furtherance of the undertaking. Plea, non assumpsit. At the trial before Lord Lyndhurst C. B. at the *London* sittings, one *Fall*, for the defendant, proved that the plaintiff having called on him and wished him to take shares in the bridge, he (*Fall*) answered he had no money, and must *A.*, a solicitor to a company for building a bridge, procured one *F.* to hold shares for him, on his undertaking that he (*A.*) should pay the deposits and all calls on them. *F.*'s name was accordingly registered as a shareholder. *A.* then sued a member of the company for money paid and journeys taken in the service of the company. Held, that he being in fact the real partner, could not recover at law against his co-partner, no account having been settled, or balance struck.

A payment had been made to the plaintiff on account, but unappropriated at the time of payment:—Held, that it must be applied to his legal demand accruing due before any act by him to become a partner; and not to a subsequent equitable one.

Semle. If such payment had not been so applied, the plaintiff might have sued at law for that prior demand.

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leave such matters to richer men. That plaintiff said, that as he was solicitor to the company, and expected to continue so, he could not take any shares (a) himself, but that he should be obliged to *Fall* if he would allow him to use *Fall's* name for that purpose, and he would pay the deposits and every other claim in respect of them. *Fall* consented, and was inserted in the list of shareholders. The plaintiff gave him a receipt for 25*l.* as his deposit on 10 shares, but *Fall* never paid any thing on account of them. £200 had been paid to the plaintiff on account, which covered the demand due to him down to the time of registering *Fall's* name. In answer to questions from the learned judge the jury said they believed *Fall*, and that he had held shares for the plaintiff. A verdict was found for the plaintiff for 94*l.*, the balance of his account, subject to leave to move to enter a verdict for the defendant.

Goulburn Serjt. moved accordingly, by citing *Holmes v. Higgins* (b), and *Milburn v. Codd* (c), as in principle sustaining his position, that the plaintiff being substantially a partner could not sue his partner, or hold shares by another.—Rule granted (d).

Holt and *Hoggins* showed cause. 1st, the plaintiff was not a partner in fact recognised by the company. Their assent was necessary, for no third person can be imposed on a partnership without their consent, though a partner may have transferred his share to him; *Bray v. Fromont* (e). So a partnership does not survive for the benefit of executors of a deceased partner; *Pearce v. Chamberlain* (f). [Lord *Lyndhurst* C.B. Why might

(a) There was no rule that the solicitor should not take shares, but the plaintiff might have desired to avoid an open partnership.

(b) 1 B. & C. 74.

(c) 7 B. & C. 419.

(d) Afterwards changed by the court into a rule for a nonsuit.

(e) 1 Maddock & Geldart (sometimes cited as 6 Madd.) 5.

(f) 2 Ves. 33.

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not *Fall* be merely acting as the plaintiff's agent? If so, and it was not known at the time, would not the plaintiff be still liable for all the debts of the concern as an undiscovered partner, among others to this debt? If he is, he is here suing his partners at law.] If the plaintiff was a dormant partner, and liable as such *quoad* the public, who might be creditors of the company, he cannot be liable as such *quoad* them, for they never admitted him. [*Bayley* B. It appears that every man except the solicitor, who would pay a deposit and the calls might be a partner. But the solicitor, in the name of his agent, holds shares and gets the benefit of them. Then is not he subject to every liability and disability to which as a partner he would be open, even though his taking the shares against the rules might expose him to be deprived of any benefit from them? Suppose the concern to be advantageous, and the plaintiff, through *Fall*, to get large profits; if *Fall* became bankrupt, would not the plaintiff be liable to contribute to subsequent losses by the other partners in respect of the profits so obtained by him through *Fall's* name?] How could *Fall* have filed a bill for community of profits as partner? If he could not, a mere sub-contract with him would not make him a partner; *Coope v. Eyre* (a), *Saville v. Robertson* (b). [Lord *Lyndhurst* C. B. The dates of the journey &c. are important, being before the plaintiff or *Fall* held shares. Then would not the plaintiff be liable to contribute to this very debt? For it is incurred for the benefit of the concern, the profit of which he shares in. If so, how can he sue for it at law? It might be said *Fall* was the partner, and if so he must apply to equity; but a court of law, by considering *Fall* as the plaintiff's agent as well as trustee, may attain the same object. The

(a) 1 H. Bl. 37.

(b) 4 T. R. 720.

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privity between principal and agent would give an action against the principal. The plaintiff as a stranger cannot be in a better situation than *Fall*, who ostensibly acts as principal; he is therefore entitled to all the benefits and subject to all the liabilities incurred by that agent. *Bayley B. Goddard* could never have levied on *Fall* if he had obtained an execution against the rest of the company. If the plaintiff recovered in this action, might not *Hodges* sue *Fall* for contribution, and then *Fall* the plaintiff? Suppose *A.* and *B.* to be owners of a ship, and *C.* to have no money of his own, but to buy a third of her, as for himself, with *D.*'s money,—may not all persons who have supplied her with outfit sue *D.*, not as a sub-contractor or purchaser coming in under *C.*, but as the joint owner and partner really benefited by the supplies, and *ab origine* liable? for there is a great difference between a person so liable and another coming in by purchase from a partner. Whether fraud existed or not, the objection to the action arises when the plaintiff and not *Fall* appears to be the real partner. *Bolland B. A., B., and C.*, as joint owners, might all contract with *D.*; but if he comes in as purchaser from either, the rest may object that he is not their partner.]

Secondly. Supposing the plaintiff to be a partner in fact, he may sue, some of these disbursements having taken place before the registry of *Fall*'s name. The sum paid in was not specifically appropriated. [*Bayley B.* The advertisements and journey were among the cashier's items of expenditure, and the plaintiff had a right of action for them before *Fall* became a partner. The question is whether, the plaintiff not having then exercised his right, any thing which has happened since has taken away that right. *Lord Lyndhurst C. B.* The first payment by plaintiff on account of the shares was not till 12 *June* 1829, but the journey had taken place

in *September* 1827, and the advertising before *December* 1828, when the plaintiff received money on account. Where an account is treated as entire by all parties, and the items of charge and the payments are all of one character, and equal in their nature, they must be applied to the earliest items (a). *Bayley* B. There could be no liability of any partner at law till the partnership was closed and the balance ascertained. The earliest items for which the defendant was liable, are recoverable at law. I think the payment on account should be applied to them, and not to the subsequent items, for which the defendant is only liable in equity (b).]

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Goulburn Serjt. and *Comyn* contra, were stopped by the Court.

LORD LYNTHURST C. B.—We entertain no doubt about either point. This was an action brought by the plaintiff to recover from the defendant, who was a partner in a company, money laid out by the plaintiff on behalf of the general concern. It having been admitted that the money was expended by the plaintiff, the question is, Can he recover it at law from the defendant, or, in other words, from the company? It is urged for the plaintiff that he can, because part of this claim is made for money laid out before *Fall* engaged in the concern, and therefore before the

(a) A rule originating in the civil law, see *Clayton's* case in *Devaynes v. Noble*, 1 Merivale, 605 *et seq.*; the cases collected, *id.* 587—604; and *Bodenham v. Purchas*, 2 B. & Ald. 45. per *Bayley* J.

(b) *Birch v. Tebbutt*, 2 Stark. R. 74; *Goddard v. Cos*, Stra. 1194, 1 Merivale, 589, 606. In *Bosanquet v. Wray*, 6 Taunt. 597, 2 Marsh. 319, (A. D. 1815, but not cited in *Clayton's* case, 1 Merivale,) the first items of demand were equitable only, the second legal, but indefinite payments were held applicable to the prior items. See also *Wright v. Laing*, 3 B. & C. 165; *Cruickshanks v. Rose*, 2 M. & M. 100; *Brooke v. Enderby*, 2 Bro. & B. 70; *Shaw v. Picton*, 4 B. & C. 715.

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defendant's objection can apply; but I am of opinion that that affords no answer to the objection, because I think that the payment on account of the sum of 200*l.* ought to be applied to the earlier items. And that raises the main question, whether the situation of *Fall* was that of a real partner, or whether the plaintiff was really the partner so as to deprive him of his right to sue. Now *Fall* swears that the plaintiff having represented to him that he could not hold shares, asked *Fall* to allow him to use his name, and added that he would pay the deposit. *Fall* swore he never mentioned this arrangement, but believed it was suspected by the shareholders. *Fall*'s name was registered and he held the receipts for advances on ten shares, so that he became ostensibly a member of the company; but I am of opinion that the plaintiff became really a partner in the concern, and liable to its debts. Here the debt claimed is due from the concern, and therefore the ordinary principle applies, that a partner cannot be sued at law by his co-partner before their accounts are settled, because the latter is liable to contribute to the very debt sued for. I consider that *Fall* acted merely as an agent to the plaintiff, and that the case is the same as if the plaintiff's own name had been registered in the company's books. On neither point therefore is the plaintiff entitled to recover.

BAYLEY B.—The rule that one partner cannot sue another at law till the account is closed and a balance struck, is a right one, because a partner who sues another in order to recover money laid out for the general concern, tries to enforce payment of all the sums he has laid out, without considering that other partners may have expended money to as high an amount on similar objects. To that expenditure the plaintiff was bound to contribute. That objection is let in to this case, as no agreement or account exists between the partners. Then is

the plaintiff a partner in this company or not? In such a concern as this there is no anxiety as to the description of persons who shall become partners, or whether particular parties shall be admitted or excluded. Every man who signs and pays may become a partner. The plaintiff stood in a situation in which the step of taking shares in his own name, so as to become an ostensible partner, might prejudice him with the other members of the company, or might be thought by him likely to produce that effect. But is he not a real partner? Under the circumstances, as arranged between him and *Fall*, every benefit accruing to *Fall* in respect of the shares would be received by him to the plaintiff's use. If a loss should happen, it would be most unjust as between *Fall* and the plaintiff that the former should contribute to bear it. The agreement in fact was, that *Fall* should be the nominal, and the plaintiff the real partner. Then the fact of concealing from the other shareholders who the real partner was, will not extricate the plaintiff from any disability otherwise accruing to him.

This demand has been split into two divisions, one before *Fall* was registered as a partner, and the other after. Had any part which accrued due before his ostensible partnership remained unsatisfied, I should have been inclined to accede to his claim to recover it; but I am of opinion that the payment of 200*l.* on account should be applied in liquidation of the earlier items, for which alone the plaintiff can make any legal claim. If a legal debt exists, and also one which would only become such on settling the partnership accounts and striking a balance, we are bound to apply an indefinite payment to the legal debt.

The other Barons concurring,

Rule absolute (for entering a nonsuit.)

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HICKS *against* MARRECO.

When a defendant is arrested by process, in which his name is stated in initials, Held that "due diligence" is used, so as to satisfy the 32d article in the *Reg. Gen. Hil. 2 W. 4.*, if his name is inquired for from different people likely to know, though not at his house or office, or from his immediate friends; it being sworn that the debt being large, the defendant, a foreigner, was likely to leave this country if he got notice of any intended proceedings against him.

Affidavits may be used in showing cause, though sworn after the time named for showing cause in the rule.

A RULE had been granted for delivering up a bail bond to be cancelled, on the ground that due diligence had not been used to discover the real names of the defendant, pursuant to *Hil. T. 2 Will. 4. Rule 32. [ante, Vol. II. p. 343.]* The affidavit in support of the rule stated the defendant to have been arrested as *J. A. Marreco*, and that his real name was *Antonio Joachim Freyre Marreco*; that he had traded in *London* for nineteen years at 26, *New Broad Street*; that all his names were entered at the alien office and in one of the *London* directories, that had the plaintiff inquired at certain places of business named in the affidavit, or at the alien office, his names might have been ascertained.

Mac Mahon showed cause on an affidavit of the plaintiff that he lived at *Bath*, from which place he instructed his attorney in *London*, without knowing how to give him information of defendant's names. The plaintiff's attorney swore to inquiring for the defendant's names from several persons named in his affidavit and likely to know them, but without success, one of them saying he knew, but would not disclose them. The defendant's correspondence and one *London* directory only contained his name "*A. J. Fryre Marreco*." Search is not permitted at the alien office, except for political purposes. He contended that due diligence was shown, so as to satisfy the late rule.

R. V. Richards contra. The rule was drawn up for yesterday, and, as no cause was shown then, might have been made absolute this morning. The plaintiff's affi-

davit is sworn to-day, which is too late. The court dissented (a). He then insisted that the plaintiff must show, affirmatively, "that he had used due diligence," but had not done so.

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BAYLEY B.—I am of opinion that due diligence has been used, and that considerable pains have been bestowed by this plaintiff to discover the defendant's names; that amounts to using "due diligence" within the general rule cited. This rule must therefore be made absolute. The defendant himself can have no doubt that he is the person to whom the writ is intended to be directed, for it adopts the initials he is in the habit of using in his signature (b).

The plaintiff, who resided at a distance, did not know the defendant's names, but wrote to his attorney to make inquiries about them. The attorney did not inquire at the defendant's office or house, or to him or his friends, but the affidavit suggests reasons for his not doing so. The sum for which the plaintiff proceeds is large, and misconduct is imputed to the defendant. The plaintiff's attorney swears, that, had his intention been known, he believes the defendant, who is a foreigner, would have left the kingdom. It would, therefore, have been imprudent in the attorney to go to inquire for the defendant at his house, or of persons likely to tell him of the inquiries; but he did go to some of his foreign connexions, one of whom knew, but refused to tell him the defendant's names. It appears that at the alien office a search is not allowed for an

(a) *Percival v. Hadley*, Easter 1831. Affidavits sworn after the time mentioned in the rule were objected to on that ground, but permitted by the court to be read; they at the same time intimating that they might be sworn any time before showing cause. MSS. *Magistri Dat.*

(b) As to process, &c. in actions on written instruments in which initials are used, see Stat. 3 & 4 Will. 4. c. 42. s. 12.

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object like this; and when we contrast the affidavit with, at least, one existing *London* directory, satisfactory information would not have been obtained from the latter source. Had it been found in all of them, a mere transposition of the names by the editor might have produced a plea in abatement.

The other Barons concurred.

Rule absolute.

RUSSELL *against* HURST.

A rule to change the venue obtained, though the defendant is under terms to plead issuably.

WATSON had obtained a rule to change the venue, in a town cause, to *Yorkshire*, which had not been drawn up, it being thought too late, as the defendant was under terms to plead issuably.

Lord LYNTHURST C.B.—In *Brettargh v. Dearden* (a) and *Waring v. Holt* (b) the defendant had obtained time to plead “on all the usual terms.” (c) The court there refused to change the venue to a distant county (*Lancashire*), because *those* terms imported to include short notice of trial; but the present terms are only for pleading issuably.

Rule drawn up accordingly.

(a) *Macdelland & Younge*, 106.

(b) 3 Pri. 3.

(c) Implying, in this court, pleading issuably, rejoining gratis, taking short notice of trial and retaining the venue. See the cases in (a) and (b), *Notts v. Curtis*, ante, Vol. II. 307; *Cowp.* 311; 7 T. R. 698; *Sayer*, 307; 7 Taunt. 166; 1 Bing. 186.

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SMITH *against* ESCUDIER.

AN affidavit to hold defendant to bail, as drawer of a bill, omitted to state that the acceptor of the bill or maker of the note had not paid the respective amounts. A rule to discharge the defendant out of custody having been obtained, *Bradshaw v. Saddington* (a) and *Hughes v. Brett* (b), were cited to show that it was sufficient. But, *per Curiam*. The affidavit is not certain to every intent, for it does not appear that the sums gone for were unpaid; and it has been held, in *Buckworth v. Levy* (c), that an affidavit to hold the drawer of a bill to bail should state the non-payment by the acceptor.

Affidavit to hold the drawer of a bill, or indorser of a note, to bail, should state that the acceptor or maker had not paid the amount.

Rule absolute.

Channel for the rule, *Richards* against it.

(a) 7 East, 94.

(b) 6 Bing. 239.

(c) 7 Bing. 251.

SMITH and Wife *against* STEPHENS.

THE defendant had been arrested on an affidavit to hold to bail made by the plaintiff's wife, which stated that defendant was indebted to the plaintiff and herself in the sum of 1000*l.* for money lent and advanced to defendant, and for money had and received by defendant, at his request, to and for the use of the wife, before her intermarriage with the plaintiff.

An affidavit to hold to bail for money lent, was held bad, for not stating by whom the money was lent.

Knowles had obtained a rule for discharging the defendant, on filing common bail.

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Busby showed cause:—1st, on No. 33 of *Reg. Gen. Hil. 2 W. 4.* [*ante*, Vol. II. 343.] that no application to set aside “*process* or *proceedings*” shall be allowed after a reasonable time, or fresh step taken by party applying. [*Bayley B.* This is not a process or proceeding within that rule:] 2dly, perjury might be assigned on this affidavit, that money was lent by this deponent (meaning *Elizabeth Smith*) to the defendant; that would satisfy the rule stated in *Bennett v. Dawson* (a) and *Hughes v. Brett* (b).

BAYLEY B.—It is desirable that uniformity should be introduced into affidavits to hold to bail. I entertain no doubt that in this case the plaintiff was bound to show in his affidavit by, as well as to whom, the money sought to be recovered was lent. A similar rule has prevailed where the defendant has omitted to state that goods were sold and delivered to the defendant by the plaintiff (c).

(a) 4 Bing. 609.

(b) 6 Bing. 239.


(c) See *Perks v. Severn*, 7 East, 193; *Cathrow v. Hagger*, 8 East, 106, and other cases cited, Tidd, 9th ed. 183.

CHANDLER *against* BROUGHTON.

Trespass lies against a master for the act of his servant, where while the servant drives his master in a gig, the horse runs away and does damage.

TRESPASS. At the trial before *Bayley B.* at the *Middlesex* sittings, it appeared that the defendant being sitting in a gig with his servant who drove, the horse ran away and did damage to the church in *Langham Place*. The objection at the trial being, that the action should have been case, leave was given to move for a nonsuit. The learned Baron left it to the jury, whether the horse was fit to go in single harness, and whether there was a competent driver.—Verdict for the plaintiff.

Harrison afterwards moved for a nonsuit. [*Bayley* B. Where the master sits in his carriage by the servant who drives, is not that driving the act of the master? for he has the immediate control over his servant.] *Harrison* mentioned the act of steering a ship by a pilot. [*Bayley* B. There the pilot is independent of the captain. Here the master was present when the servant in the course of his service did an act immediately injurious to another. Then trespass lies.]

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The other Barons concurred.—Rule refused.

WARD *against* BATEMAN.

CASE for injury to a reversion. Plea, that the grievances were acts done in execution of the office of surveyor of highways, with a tender of 5*l.* as amends under 13 G. 3. c. 78. s. 79. An arbitrator had found that the reversion had sustained 5*l.* damages but that the acts occasioning it had been done by defendant in execution of his office as surveyor. He ordered defendant to build a wall, and then directed a general verdict to be entered for him.

A surveyor of highways sued for an act done in pursuance of 13 G. 3. c. 78. s. 81. is not entitled to treble costs upon a verdict found for him.

Only single costs having been allowed, *Humphrey* obtained a rule to review the taxation, claiming treble costs under 13 G. 3. c. 78. s. 81 (*a*), against which,

Adams Serjt. and *Amos* showed cause. The 13 G. 3. c. 78. s. 81, giving treble costs in the nature of a penalty, must be construed strictly, and cannot apply where a special plea is pleaded. That section enacts, that in any action commenced for any thing done in pursuance of this act, the general issue may be pleaded and the special matter given in evidence; the jury are to find for defendant if his act appear to have been so done. If plaintiff is non-

(a) S. 82 in some editions of the statutes,

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sued, or discontinues after appearance, or if judgment is given against him on demurrer, the defendant is to recover treble costs. Then *Gurney v. Buller* (a) applies, where similar words were construed strictly, and not allowed to include the case of a verdict for the defendant. Nor is this case within the meaning of the act; for as the special plea admits a wrong done by the defendant, it shows he has not been unduly harassed. The turnpike act, 3 G. 4. c. 126. s. 147. expressly gives treble costs where the defendant has a verdict; so do 14 G. 3. c. 78. s. 100. the building act, and 7 J. 1. c. 5, in actions against justices.

Goulburn Serjt. and Humphrey contra. If the fact committed appears to have been done by authority of the act, the jury, by one clause of the section, is to find for the defendant; that clause is entire in itself, and ought to be separated from the next, which begins in the alternative, 'or if plaintiff shall become nonsuit &c.' The latter part gives treble costs to each preceding clause as a class entire in itself. *Pratt v. Hillman* (b) arising on the building act, shows that a verdict awarded by an arbitrator carries treble costs under that act, and the court there went beyond the strict wording, to prevent actions for matters done in pursuance of it.

BAYLEY B.—If the legislature intended that in this case the defendant should have treble costs on obtaining a verdict, it has been unfortunate in the wording used to express that intention. The section by one clause provides, that if the fact committed "shall appear to have been so done (*i. e.* in pursuance of the

(a) 1 B. & Ald. 670, on 11 G. 2. c. 19. s. 22, giving double costs to avowant in replevin.

(b) 6 D. & R. 481.

act,) or if the action is brought after the time limited for that purpose, or in a wrong place, then (as a consequence) the jury are to find for the defendant." That ends that sentence. Then comes a new one, beginning in the alternative "or if the plaintiff shall become nonsuit, or discontinue after appearance, or if on demurrer judgment is given against him, the defendant shall recover treble costs." Thus the legislature having contemplated a verdict for the defendant, and ordered it to be found for him in some cases, proceeds to give him treble costs in three cases only. There might be good reasons to omit the case of a verdict; but without inquiring into them, we should be doing violence to the language of the legislature if we gave treble costs, by implying that the omission was made without a purpose. Our decision does not turn on the tender of amends pleaded. *Pratt v. Hilman* proceeded on very different words.

BOLLAND B.—This section was intended to protect a public officer, and does so, so far as he ought to be protected. There might be good reason for giving the defendant treble costs on the three cases enumerated only, and for withholding them in the case of a verdict for him. For if a plaintiff is nonsuited or discontinues, he has no present right to recover, and the defendant is wrongfully brought into court. Again, a judgment against the plaintiff on demurrer, shows him wrong in law; but in a case involving a question upon which a verdict is taken, it might be intended not to protect the officer against those who might have a right to try a question of encroachment with him.

GURNEY B. concurred.

Rule discharged (*a*).

(*a*) Note. The turnpike act, 13 G. 3. c. 84. s. 85. has similar words to those of 13 G. 3. c. 78. s. 81. above decided on.

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DOUBLE *against* GIBBS.

A master of a ship trading constantly from *London* to *Rotterdam*, having no residence or place of carrying on business in *London*, but merely being there during the unloading and loading his cargo at a particular wharf, is not entitled to the protection of the *London* court of requests act, where a verdict for less than 5*l.* is recovered against him, though he buys necessities in *London* for each trip.

Seemle, an action for use and occupation may be brought in the *London* court of requests, notwithstanding the exception in s. 11. of 39 & 40 *G. 3. c. civ.*

THE defendant was master of a ship trading regularly between *London* and *Rotterdam*, and had a dwelling house in *Southwark*. On his arrivals in the *Thames* during the last eight years he had always brought his vessel to a mooring off *Brewer's Quay*, within the city of *London*, and remained in *London*, while his vessel was unloading and reladen, but at no certain residence or place of business there. That business occupied sometimes three days and sometimes one. During that time he purchased necessities for his next trip, and placed the goods he had brought home in warehouses occupied by other persons at *Brewer's Quay*. He was served with process in *London*, and had a verdict against him for less than 5*l.* in assumpsit, with a count for use and occupation. A rule was obtained to enter a suggestion on the roll to deprive the plaintiff of costs, under 38 & 40 *G. 3. c. civ. s. 12.* the *London* court of requests act.

Comyn showed cause: 1st, section 14 of the act cited excepts the action of use and occupation from the local jurisdiction created by it; *Tidd*, 958, 9th edit. citing *Holden v. Newman*(a), and *Woolley v. Cloutman*(b). [*Bayley B.* The words of 39 & 40 *G. 3. c. civ. s. 11.* do not appear to me to have that effect(c).] 2dly, the defendant, by commanding a ship trading to and from

(a) 13 *East*, 161.

(b) *Doug.* 244. on 3 *J. 1. c. 15. s. 6.*

(c) The words of 3 *Jac. 1. c. 15. s. 6.* (also in force in *London*, see s. 19 of 39 & 40 *G. 3. c. civ.*), and on which *Woolley v. Cloutman* turned, are, Act shall not extend "to any debt for any rent upon any lease of lands or tenements, or any other real contracts;" or to "any debt where any title of freehold or lease for years of any lands or tenements shall come in question, or to any debt by specialty, &c."

London and not “residing or inhabiting” there, does not “seek his livelihood” within *London* only, as must appear, in order to claim the protection of its local act; *Stephens v. Derry* (a). Nor does he keep a house, warehouse, shop, shed, stall or stand, or trade or deal within *London*, (s. 35.)

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Bompas Serjt. contrà. In *Croft v. Pitman* (b), a coal merchant, having a wharf and counting-house in *Southwark*, and half a counting-house in *London*, was held to “seek his livelihood” in *London* within this act. A defendant need not seek his whole livelihood in *London* in order to be within this act; *Bushnell v. Levi* (c). There a sheriff’s officer who carried on business at offices in *Middlesex* and *London* was held to “seek his livelihood” in *London*, though the debt was contracted in *Middlesex*. *Fleming v. Davis* (d) is a similar case to the last. He argued that the case was within the words shed, stall, &c.

LORD LYNDEHURST C. B.—In the cases cited, the defendants had places in the city of *London* to carry on business in, and did actually carry on business there (e). But this defendant has neither residence nor place of business in *London*. If we could assume a buying and selling by the defendant in *London* at all, we might not be of opinion that it amounted to a “seeking his livelihood” there, for it does not appear to take place on his own account, but on that of his owner.

BAYLEY B.—I am clearly of opinion that this defendant does not fall within this act, or every captain of a

(a) 16 East, 147.

(b) 5 Taunt. 648; 1 Marsh, 269, S.C.

(c) 5 Bing. 315.

(d) 5 D. & R. 371.

(e) In *Kemsett v. West*, 5 D. & R. 626, the counting-house in *London* was only for receiving orders, but the business was carried on in *Surrey*.

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coaster who constantly comes to the same wharf would otherwise be within it.

BOLLAND B.—Here the defendant seeks his livelihood by navigating a vessel carrying goods between *London* and *Rotterdam*, which he moors in the *Thames* off *Brewer's Quay* when here, and is only in *London* while his ship is there. Then *Stephens v. Derry* (a) governs this case, where Lord *Ellenborough* says, the act must have a sober construction, and that in order to entitle a party to be sued in *London* by seeking his livelihood within the city, he should seek the whole of his livelihood there, and not be in a state of vagrant existence for this purpose, seeking it partly within and partly without the city.

GURNEY B. concurred.

Rule discharged.

(a) 16 East, 148, S.P. *Kemsett v. West*, 5 D. & R. 626.; *Reeves v. Stroud*, 1 D. Pr. Cas. 399, where *Taunton J.* reviewed the decisions.

EVANS *against* WILLIAMS.

The defendant and a surety had signed a promissory note before the defendant was discharged under 7 G. 4. c. 57. (Insolvent Act); after which,

to prevent an

action against the surety, the defendant joined him in a new note to the plaintiff for the amount of the old one with interest. Held, that that note could not be recovered on against the insolvent, for it was a "new contract or security for payment of the same debt," as to which he was entitled to be discharged; and that the additional consideration of forbearance to the surety did not affect the case.

ASSUMPSIT on a promissory note. Plea, discharge under the insolvent act, 7 G. 4. c. 57. At the *Carmarthenshire* assizes it appeared that the defendant had been so discharged from a debt on a note given by him and *E.* as surety for sheep sold to defendant. After which, to stop an action against *E.* on that note, as threatened by the plaintiff, the note now sued on

was given by defendant and *E.* for the amount of the old one with interest. *Alderson J.* nonsuited the plaintiff upon 7 G. 4. c. 57. s. 61. with leave to move to enter a verdict.

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John Evans moved accordingly. The forbearance to sue *E.* was a fresh and distinct consideration for the new promise, for he remained liable to the plaintiff, notwithstanding the defendant's discharge. Then this note is a security for *his* old debt, and not a "new contract or security" for that of the plaintiff, which had been extinguished. Section 61 of 7 G. 4. c. 57. was introduced to remedy the evil apparent in *Sweeney v. Sharp (a)*; but only applies where the original debt is the sole consideration for a promise made by the insolvent after his discharge.

LORD LYNCHURST C. B.—It appears to me that this note is, within the express wording of section 61, a new security given for "the same debt or sum of money" for which the defendant was before liable. The consideration of the old note remains now; and though that of forbearance is added, nothing in the act proves that to make a difference.

BAYLEY B.—The defendant, though discharged, stood in a different situation from others, and was prevented by this act from incurring the responsibility which third persons might take on them. When the note sued on was given, the defendant's future assets were liable to distribution among his previous creditors. The act foreseeing that situation of insolvents, expressly disabled them from becoming liable, on a new contract, for their old debts. Then this note is clearly

(a) 4 Bing. 37.

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a "new security" for the old debt; for if the defendant was discharged from it, *Edwards* remained liable. And if the defendant's assets paid 20*s.* in the pound before the new one became due, that would satisfy the old note, so that no recovery could take place on the new one.

BOLLAND B.—The case is within the letter and spirit of the act. The defendant came forward to secure the same debt from which he had been exonerated.

GURNEY B. concurred.

Rule refused.

WADSWORTH *against* MARSHALL.

The original subpoena ad testificandum should be shown to the party subpoenaed at the time the copy of it is served, or an attachment will not lie against him for disobedience.

JOHN WILLIAMS showed cause against a rule for an attachment against the defendant for disobedience to a subpoena ad testificandum, that the original rule was not shown him at the time he was served with the copy. *Knowles* contra. It is not necessary to show the original process, unless the party served requires it; it is otherwise on moving for an attachment for disobeying a rule of court.

Per Curiam.—The master reports that the usual course is to show the original subpoena to the party at the time he is served with the copy. There are cases where the service of a document is complete by serving a copy without showing the original, but there is a clear exception where a party is sought to be brought into contempt.

Rule discharged.

1832.

The KING at suit of NIGHTINGALE *against* BUCHANAN.

THE defendant had been found indebted to *Nightingale* and others, by inquisitions taken on special writs of *capias utlagatum*, returnable *July* 1831, and *March* 1832. Whereupon the plaintiff petitioned for payment to him of the money raised by the sheriff, and on 19th *June* 1832, obtained the usual treasury warrant and consent of the attorney general for an order to the sheriff to that effect. On 4th *July* a baron's order for staying the payment of the money by the sheriff till 10th *November*, was granted to the executors of the defendant, on affidavit of his death at *Paris* on the 30th *May* 1832, the deponent having seen him in his coffin. A plea of his death and the determination of the outlawry having been entered on the roll, *Wray* for the executors moved for further stay of proceedings and payment by the sheriff, on the ground that the plaintiff had no right to the money till the order to the sheriff was obtained; and that it being now ascertained that the defendant died before the time of granting the warrant by the treasury, his executors were entitled to judgment of *amoveas manus*. *Jervis* and *Keene* *contra*, relied on the sufficiency of the warrant and consent to vest the money in the plaintiff on 19th *July*. They also urged, that to reverse an outlawry by death, the certificate of the minister of the parish was necessary, as well as an affidavit of the death; citing *Tidd*, 9th ed. 144.

An outlaw died abroad before a treasury warrant and attorney general's consent were granted in order to authorise the sheriff to pay over money in his hands under a *capias utlagatum* to the plaintiff in the action. Held, that that warrant and consent granted in ignorance of the defendant's previous death, did not vest the money in the plaintiff, and the court, on motion of the defendant's executors, stayed payment over to the plaintiff by the sheriff till their plea of defendant's death should be traversed and the facts tried.

Lord LYNTHURST C. B.—The attorney general's consent and the treasury warrant would have been withheld, had the previous death of the outlaw been then known. Nor do they amount to an appropriation of the money to the use of the plaintiff. The crown having now ascertained the date of the death, what has been

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done so far by mistake, must be taken as if not done at all. The party's absence abroad accounts for the mistake, and the place of his death must necessarily dispense with the proof of death insisted on; it being wholly inapplicable to that event when taking place in France. Nor is the reversal of an outlawry the question here. If the plaintiff disputes the death, let him traverse the plea.

The other barons concurred.

Rule granted.

CAMPBELL *against* ACLAND.

Bail will obtain time for rendering a defendant who has been sentenced to imprisonment for an offence till a week after the imprisonment under the sentence shall have expired.

THE defendant having been sentenced to twelve months imprisonment in *Bury* gaol for one libel, to three months more for a second, and to other three months for a third, *Dunn* for defendant's bail moved to enlarge the time for rendering him till a week after the expiration of the term for which he was sentenced had expired, citing *Ashmore v. Fletcher* (a), and *Rouch v. Boucher* (b). The court enlarged the time till a week after his imprisonment under the three sentences should be ended, saying that he might be pardoned and liberated before the time had elapsed for which he was sentenced.

(a) 13 Pri. 523.

(b) 10 Pri. 104.

GREEN *against* JACOBS.

1832.

J. JERVIS moved to rescind an order of a baron made under 11 G. 4. & 1 W. 4. c. 70. s. 21. to render at a county gaol. He also cited *Reg. Gen. Exch. M. 1. W. 4.* [Vol. I. 162.] The sheriff had put in bail above in order to render, and a baron made an order for such render at the instance of the sheriff and the bail. The notice of render given to the plaintiff was signed by an attorney's name, subjoining, "attorney for the sheriff."

Where a sheriff has put in bail above in order to render, and has obtained a judge's order for rendering at instance of himself and his bail, (see 11 G. 4. & 1 W. 4. c. 70. s. 21.) that order will not be rescinded though it might be amended by striking out all which showed it to be granted at the sheriff's instance.

BAYLEY B.—The sheriff pursued the old course of putting in bail above, in order that they, having thus acquired the custody of the defendant, should render him. Then the sheriff had in substance a right to an order for a render for his own protection, and, if worth while, the order might be amended by stating it to have issued at the instance of the bail. The signature of the notice of render by the sheriff's attorney, instead of the defendant or his bail or their attorney, is not a ground for this motion, but rather for setting aside the render.

Semb. the notice of render should not be stated to be signed by any person as attorney to the sheriff.

Motion refused.

CONSTABLE *against* JOHNSON.

KNOWLES had obtained a rule to stay proceedings, on the ground that the attorney whose name was indorsed on the process (*a*), not being on the roll of this court, it was the same as if no attorney's name was indorsed. It appeared that the attorney was admitted in Chancery, and in K. B. and C. P.

Where the name of an attorney of the other courts, but not of the Exchequer, was indorsed on process of this court proceedings were stayed till the

(*a*) See 2 W. 4. c. 39. s. 12. and *Reg. Gen. M. 3 W. 4. No. 10.*

name of an attorney of the court was substituted, on payment of costs by the attorney so indorsed.

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The *Court*, saying he was an attorney, stayed the proceedings till an attorney of this court should be substituted, ordering the attorney indorsed on the process to pay the costs of the motion.

GOMPERTZ *against* DENTON.

A buyer of a horse on a warranty of soundness, can only recover for breach of it in an action for damages; and unless both parties agreed to rescind, or unless in the original contract it was stipulated to be rescinded, if any breach of it took place, the buyer cannot sue the seller for money had and received as for a failure of the original consideration. Therefore he has not reasonable or probable cause for holding him to bail within 43 G. 3. c. 46. s. 3.

THE defendant was arrested for 90*l.*, 60*l.* of it for the price of a horse, and 30*l.* for money paid, being the difference in exchange for another horse of defendant's valued at 90*l.*, warranted sound, and sold to plaintiff. That horse proving unsound, the plaintiff took him back to the defendant, proposing to rescind the contract, and a treaty for that object was broken off by defendant. The plaintiff declared in assumpsit on the warranty of the horse, with counts for money had and received, and recovered 48*l.* A rule having been obtained for payment of costs by plaintiff to defendant under 43 G. 3. c. 46. s. 3.

Richards showed for cause that though the plaintiff might not be entitled to rescind the contract unless the defendant agreed to it, an absolute formal rescinding of it need not be shown, and he might still have a reasonable and probable cause for making the arrest; citing *Best C. J.*'s dictum in *Turner v. Prince* (a), *Sherwood v. Taylor* (b). [*Bayley B.* (adverting to *Turner v. Prince*) the defendant need not show malice in order to get his costs under this act, *Donlan v. Brett* (c).] The contract was once agreed to be rescinded. There was enough to convince a jury of that.

Lord LYNTHURST C. B.—The plaintiff's proposition to rescind, though at one time entertained by the

(a) 5 Bing. 191.

(b) 6 Bing. 280.

(c) 10 B. & Cr. 117.

defendant, was not completed; then the contract remained open; for one party alone could not by his own act rescind the contract. In *Street v. Blay (a)*, where this point was fully considered, the court of K. B. thought that the breach of warranty of a specific article as a horse, was no ground for treating the contract as rescinded, except both parties had consented to the rescinding, or it was part of the original agreement that it should be rescinded in such an event. The law was there very fully considered. The remedy here was by action for damages, consequently the plaintiff had no reasonable or probable cause for holding the defendant to bail.

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BAYLEY B.—If a contract remains open so as to give a party a right to recover damages for breach of the warranty, he cannot maintain *indebitatus assumpsit*, as for failure of consideration; *Power v. Welles (b)*.

(a) 2 B. & Adol. 461, 462.

(b) Cowp. 818. and see *Hunt v. Silk*, 5 East, 449.

BAKER and Another, Assignees of a Bankrupt, against
NEAVE, Bart.

FOLLETT showed cause against a rule for amending the declaration, by adding the name of the official assignee, that there was no writ or other proceeding by which to amend and make the addition prayed; for the official assignee had never been a party to the suit. No case has gone beyond striking out the name of one of several defendants. In *Tabram v. Tenant (a)* the capias was amended by a new original which had been issued, containing the name of the party sought

The name of the official assignee (see 1 & 2 W. 4. c. 56. s. 32.) was omitted in the declaration by assignees of a bankrupt; but the court allowed it to be amended by inserting his name.

(a) 1 B. & P. 481.

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to be made a co-plaintiff; and the defendant's interest was not affected. *Humfrey* supported the rule.

Per Curiam.—The official assignee is appointed by the act 1 & 2 Will. 4. c. 56. s. 22. to be in all cases an assignee of a bankrupt's estate, together with the assignees chosen by the creditors. That makes this case very different from that of an ordinary plaintiff. No affidavit is made that this action was defended on this ground alone. A writ of error has been amended by striking out a plaintiff's name, and a defendant's christian name. No real hardship to the defendant arises by this correction.

Rule absolute on payment of costs of the amendment and the motion.

LOWE *against* ELDRED.

Where in an action on a promise to pay the debt of another, the plea is, that no note in writing was signed by defendant or any person, &c., *semble*, the plaintiff cannot take issue, but must set out the agreement in his replication.

ASSUMPSIT on a promise to pay the debt of another. Plea, that there was no agreement nor any memorandum or note thereof in writing, signed by the defendant or any person by him lawfully authorized. Replication, that there was such an agreement in writing, concluding to the country (without setting out the agreement). Demurrer and joinder. The court having intimated a strong opinion against the replication, *Follett* obtained leave to amend. *Mansel* was to have argued for the defendant (a).

(a) See Sir T. Ray. 450; Com. Dig. Action on Assumpsit, (F. 3.); 2 Salk. 519; Bac. Ab. tit. Agreement, (C.); 2 Saund. 180 b. 276 d. n. (c); Stephen on Pleading, 1st ed. Chap. II. Sect. IV. No. ii. and Sect. vii. Rule IX.

WOOD *against* CRITCHFIELD.

1832.

AN affidavit of service of a rule to show cause had been made on behalf of the defendant; but the copy served was not entitled in the cause. *Milner* for the plaintiff, objected to the service on that ground. *Turner* for the rule, said the plaintiff's appearance by counsel cured the irregularity.

The served copy of a rule must be entitled in the cause, and the appearance of the party served by counsel, does not cure the omission.

But the Court discharged the rule with costs.

BLANDY and Another *against* WEBB.

BIGGS ANDREWS on the 16th *November* obtained a rule calling on the plaintiffs to show cause why the defendant should not be superseded or discharged out of the custody of the warden, as to this action, with costs, on the ground that the plaintiffs had not lodged the rule for his commitment in due time. By the defendant's affidavit it appeared that on *Saturday* the 10th *November*, the defendant was brought up from the King's Bench prison by *habeas corpus*, and committed to the Fleet in execution in this suit. On the same day he issued a *habeas corpus cum causâ*, returnable *immediatè* before the Chief Justice of the King's Bench, and lodged it with the warden; but the rule for the commitment of defendant to the Fleet was not left with the warden or lodged at the Fleet prison on the day the defendant was so committed, as he alleged to be the practice. It was lodged about 4 o'clock in the afternoon of 18 *November*, too late for the warden to make out his return to the writ of *habeas corpus cum causâ*. The affidavit also stated, that the defendant was supersedable as to one or more of the actions in which he was in custody; but could not have ob-

The rule charging a defendant in execution, need not be lodged at the prison on the same day the defendant is charged in execution.

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tained his discharge as to them during the period the rule was omitted to be lodged, in consequence of being unable, during such period, to obtain a copy of causes of his detainer, the warden then having no written warrant for detaining him at all, and being therefore unable to give such copy.

Follett showed cause. It is sufficient, according to the practice, if the rule for commitment is left at the prison at an early opportunity within the term in which the defendant is charged in execution. That practice was here adhered to. The rule was so lodged before the application was made. Nor can the defendant be superseded without certificate of the warden, which does not appear.

Andrews in support of the rule. Till the rule for charging defendant in execution was left, the warden did not know of any actions against defendant, and could not therefore return the *habeas corpus*. By that delay the defendant has lost his opportunity of being superseded in another action, which he would have had had he been returned to the King's Bench in proper time.

Per Curiam (after consulting the master). The plaintiff is not compelled to lodge the rule for commitment of a defendant in execution on the same day that he is charged in execution; nor did any unreasonable time elapse before it was so lodged in this instance. What was at any time a cause of supersedeas in the defendant in the other actions, remains so now, and it is not suggested that the defendant has paid the other debt or is ready to pay this.

Rule discharged with costs:

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WEDDLE *against* BRAZIER.

DECLARATION *de bene esse* was filed at the opening of the office on the return day; and defendant appeared that day. Notice of filing declaration was not given till next day. A rule to set aside the declaration and subsequent proceedings was made absolute,—

The Court affirming the general rule, (*Tidd*, 9 ed. 456,) and saying, that a declaration *filed* is no declaration till notice; and that that rule must be adhered to, though open to the inconvenience that an appearance might be entered, while the party who filed the declaration went to give the notice.

Where a declaration *de bene esse* is filed, if an appearance is entered before notice given of the filing the declaration, the declaration and subsequent proceedings will be set aside.

CHALON *against* ANDERSON.

ASHERIFF being ruled to return the *renditioni exponas*, sold defendant's goods on 16 June, on the 19th had notice of defendant's bankruptcy, but on the 20th paid over the proceeds to the judgment creditor. He then obtained a rule on 1 & 2 Will. 4. c. 58. s. 6., the adverse claim act, calling on the judgment creditor and assignees to appear, and show cause why the former should not pay the money into court. *Follett* for the assignees. The sheriff has paid over and the act does not apply. *Holt* supported the rule by saying that section 6 was more general in its terms than section 1, and provided nothing about being ready to bring the money into court. *Kelly* for the judgment creditor, resisted the payment into court.

If a sheriff has paid over the produce of an execution to a judgment creditor, he is too late to move for relief under 1 & 2 W. 4. c. 58. s. 6.

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Per Curiam.—The act gives relief to the sheriff where different parties claim goods or money then in his possession, but does not apply, where he has parted with that possession. Section 6, by empowering the court to exercise the powers and authorities before contained in the act, clearly refers to those set forth in section 1; and one of the conditions of exercising those powers is there fixed to be, that the party applying for relief is ready to bring into court or to pay or dispose of the subject matter of the action in which the adverse claims are set up, in such manner as the court shall direct.

Rule discharged with costs.

HART *against* MYERRIS.

An affidavit to hold to bail on a note payable by instalments should show them to be due, and it will not be sufficient to state that the said sum has not been paid.

ACTION on a note payable by instalments. *Comyn* had obtained a rule for setting aside proceedings on filing common bail, on the ground of a defect in the affidavit to hold to bail, which, after stating the note to be payable by instalments, added, "which said sum has not been paid," without alleging that any of the instalments were due.—Rule absolute. *Platt* showed cause.

COHEN *against* WATSON.

Service or knowledge of copy of process, as well as process itself, must be denied, in order to set aside proceedings for irregularity and want of service of process.

KELLY had obtained a rule to set aside proceedings for irregularity, on an affidavit that the defendant had not been served with any writ or process, that no writ or process had come to his knowledge or possession, and that defendant had been served with notice of declaration. *Platt* showed cause. Had a copy been left and come to his knowledge, the proceedings could not be set aside on this motion.

Per Curiam.—The defendant does not venture to swear that he was not served with a copy of process.

Rule discharged with costs.

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WHALLEY *against* BARNET.

IN this case the writ and appearance were of *Hilary* term, but the declaration was not delivered till 7th *June*, in *Trinity* term, with notice to plead in eight days. The defendant gave notice, on 15 *June*, of prayer of imparlance. Judgment was signed and notice of inquiry given on 20 *June*. The inquiry was executed, a *fi. fa.* issued, and the sheriff sold and levied.

Richards obtained a rule for setting aside the writ of inquiry with costs, and that the sheriff should be restrained from paying over the proceeds of the levy to the defendant, on the ground that *Reg. Gen. Trin. T. 1 W. 4.* [Vol. I. 522,] had not altered the old rule entitling the defendant to an imparlance where the appearance and declaration are of different terms.

J. Jervis showed cause.

Per Curiam.—This judgment was irregularly signed. It has been already decided in *Edensor v. Hoffman, M.* 1831, that since the general rule *Trin. 1 W. 4.* there is no imparlance where writ, appearance, and declaration are all of the same term, if the declaration is delivered on or before the last day of term; but if the writ and appearance are of one term and the declaration of another, the defendant is still entitled to an imparlance, notwithstanding that rule,

Rule absolute with costs.

1832.



MEMORANDA.

ON the first day of this term Mr. Serjeant *Spankie* was appointed one of his Majesty's Serjeants, and took his seat within the bar accordingly.

John Beames, Robert Mounsey Rolfe, and Clement Tudway Swanston, Esq. of Lincoln's Inn, and Henry Hall Joy, of the Inner Temple, Esq. having been appointed his Majesty's Counsel, were called within the bar, and took their seats accordingly.

On *Sunday* the 4th day of *November* 1832, Lord *Tenterden*, Chief Justice of the King's Bench, died at his house in *Russell Square*, having been sworn into that office on the 4th day of *November* 1818; and

Sir Thomas Denman, Knight, his Majesty's Attorney General, having been called to the degree of the Coif, and given rings with the motto "*Lex omnibus una*," took his seat as Chief Justice in his room on *Thursday* the 8th of *November*.

The Solicitor General, *Sir William Horne*, succeeded to the office of Attorney General; and *John Campbell, Esq.* one of his Majesty's counsel, was appointed Solicitor General to his Majesty, and received the honour of knighthood.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

REGULA GENERALIS,

Hilary Term, 3 Will. 4. (a).

1833.

IT IS ORDERED, That in case a rule of court or judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such order as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action. And if the sheriff or other officer shall not duly obey such order, and the same

Where a rule for returning a bailable *capias* expires in vacation, and *cepi corpus* is returned, a judge may order the sheriff to bring the defendant into court, by putting in and perfecting bail within the same time as is allowed by the body rule in term, on pain of attachment.

(a) See 2 Will. 4. c. 39. s. 14. The marginal note is added by the reporter.

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Regula
Generalis.

shall have been made a rule of court, in the term next following, it shall not be necessary to serve such rule of court or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime.

(Signed by the fifteen Judges.)

DEWHIRST *against* PEARSON.

Defendant, as principal bailiff of a liberty, received a warrant directed to him and *W.* to arrest plaintiff. *W.* and *L.* were defendant's assistants. *L.*, by order of defendant, arrested plaintiff, telling him "he must go with him to the *Granby*" (a public house).

Plaintiff answered "Very well." He was kept at that public-house till next day by *L.*, who then delivered him to *W.* Within 24 hours from the arrest *W.* put plaintiff on a coach which took him to the county gaol. Defendant looked on and recognized that proceeding. An action having been brought for penalties incurred under 32 G. 2. c. 28:—Held,

1. That before the plaintiff could be said to have refused to be carried to some safe &c. dwelling-house, he ought to have been asked by the officer arresting him to nominate such a house, not being his own.

2. That the consent of the plaintiff to be taken to the inn was necessary, in order to justify his being taken there, and that his mere acquiescence to the officer's requisition to do so was insufficient.

3. That the putting the plaintiff on the coach within 24 hours after the arrest, in order to be carried to prison, was a "carrying to prison" within the act, not justified by the plaintiff's merely neglecting to nominate a house to be taken to.

4. That defendant was liable for *W.*'s act in so carrying the plaintiff to prison within 24 hours.

DEBT on 32 Geo. 2. c. 28. s. 1 and s. 12. against a sheriff's officer, for penalties. The first count stated the issuing of a *capias ad respondendum*, directed to the sheriff of *Nottinghamshire*, and indorsed for bail for 32*l.*; the delivery to the sheriff of the writ so indorsed, the making and delivery of the warrant by him to the defendant, and the arrest of the plaintiff. Averment, that while the plaintiff was so in custody &c., the defendant then and there being bailiff of the said sheriff of &c., conveyed and carried the plaintiff so arrested and so being in the custody of the defendant, by virtue and under colour of the said writ and warrant as aforesaid, to a public victualling and drinking house

situate and being at *East Retford*, in &c. without the free and voluntary consent of the plaintiff, contrary to the form of the statute &c. whereby and by force of the same statute &c., concluding for a penalty of 50*l.* (a).

The second count was for a similar penalty for carrying the plaintiff to *Nottingham* gaol within 24 hours from the time of the said arrest, to wit, within 22 hours from that time, without the free and voluntary consent of the plaintiff, although he the plaintiff did not refuse to be carried to any safe and convenient dwelling-house of his nomination or appointment within the town of *East Retford*, such dwelling-house not being the house of the plaintiff, and the said town of *East Retford* then and there being a market town, and the place where the plaintiff was so arrested, contrary &c. Conclusion as in 1st count.

The third count was for carrying the plaintiff, so being in custody, to a certain public victualling house

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(a) The following clauses of 32 G. 3. c. 28. s. 1. apply to the above.

Section 1 enacts, That no sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer or minister whatsoever, shall at any time or times hereafter convey or carry, or cause to be conveyed or carried, any person or persons by him or them arrested, or being in his or their custody, by virtue or colour of any action, writ, process, or attachment, to any tavern, alehouse, or other public victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested or in custody . . . nor shall carry any such person to any gaol or prison within four and twenty hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment, within a city, borough, corporation or market town, in case such person or persons shall be there arrested . . . and then and in any such case it shall be lawful to and for any such sheriff, or other officer or minister, to convey or carry the person or persons so arrested and refusing to be carried to such safe and convenient dwelling-house as aforesaid, to such gaol or prison as he, she, or they may be sent to by virtue of the action, writ, or process against him, her, or them.

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situate &c., without the free and voluntary consent of the plaintiff, contrary &c. Conclusion as before.

The fourth count was for carrying the plaintiff to *Nottingham* gaol within 24 hours from the time of the arrest, without the free and voluntary consent of the plaintiff, contrary &c. Conclusion as before. Plea, general issue.

At the trial before *Vaughan B.* at the last *Notts* assizes, it appeared in evidence that the parties resided at *East Retford* in the hundred of *Bassetlaw*, and that on 24 Nov. last the defendant, as principal bailiff of the hundred, directed *Leadbeater*, his deputy, to arrest the plaintiff in time to go by the *Amity* coach next day, (i. e. to *Nottingham*.) The arrest was made by *Leadbeater* accordingly on that day, under a sheriff's warrant directed to defendant, styled "my bailiff," and to one *Watmough*, who often acted as the defendant's assistant. *Leadbeater* took the plaintiff by the coat, saying, "you must go with me to the *Granby*," (a public house.) The plaintiff answered, "Very well," making no objection to remaining at the *Granby*, or asking to be taken to any other house; and remained there that night in custody of *Leadbeater*, who afterwards handed him over to *Watmough*. Food was supplied to the plaintiff by his son. Next day plaintiff was placed by *Watmough* on a stage coach, in the presence of the defendant, who pointed out plaintiff's situation to his family assembled at his door. Plaintiff was then carried on the coach to *Nottingham* gaol. Less than 24 hours elapsed between the time of arresting and placing the plaintiff on the coach. The learned judge asked the jury, 1st, Whether they were satisfied that the plaintiff was taken to the *Granby* without his free and voluntary consent? and 2dly, Whether he was taken to prison within 24 hours? intimating his opinion as to the latter point, that if the plaintiff did not nominate a house, or express a desire to be taken to some house,

he might legally be taken to gaol within 24 hours. The jury found that the plaintiff was not taken to the *Granby* without his free and voluntary consent, and that he was taken to gaol within 24 hours, and gave a verdict for the defendant. A rule for a new trial having been afterwards obtained,

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Adams Serjt. *N. R. Clarke*, and *Humfrey* for the defendant, showed cause. The finding of the jury precludes the plaintiff from recovering on the last count, as the carrying to prison is not proved to have taken place by the defendant's authority. For when the plaintiff was handed over to *Watmough* he became responsible for carrying him to prison, not as an agent of defendant, but as a principal, having equal authority with the defendant under the warrant. The evidence is, that *Leadbeater* transferred the plaintiff over to *Watmough*; but that does not connect *Watmough's* acts with the defendant, or show that the defendant authorized that transfer. *Watmough* therefore made a second arrest, and had he refused to take the plaintiff to any house nominated by him, he, and not the defendant, would have been liable. The defendant's directions to *Leadbeater* do not make him liable for *Watmough's* acts. Then the plaintiff has a right to sue *Watmough* as the party actually doing the wrong. [*Bayley* B. This defendant authorized the arrest. *Peashall v. Layton* (a) shows that this action lies against either sheriff or his bailiff, but not against both. *Sturmy q. t. v. Smith* (b), though on another act, illustrates the principle that the remedy may be against the sheriff for the bailiff's wrongful act.] *Watmough* did not here represent the defendant, which was the ground on which the sheriff was held liable in *Peashall v. Layton*.

2dly. The jury were properly directed to find, Whether the plaintiff was or was not taken to the *Granby*

(a) 2 T. R. 712.

(b) 11 East, 25.

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without his free and voluntary consent. Their verdict that he was not so taken, is supported by the evidence of his acquiescence. Then as he never dissented from going to the place named by the officer, or nominated another himself, he was not conveyed to the *Granby* "without his free and voluntary consent," the words in section 1. The direction to the jury is in the words of the statute; and if the plaintiff is found not to have gone there without his consent, he must have gone there with it. [*Bayley* B. Should not the officer have said, "I must take you to some safe and convenient dwelling-house, will you name one? Have you any objection to the *Granby*?" Besides, it is the officer's duty under s. 3 to show a copy of the clauses of 32 G. 2. c. 28. to the party arrested.] The officer need not do that till the party arrives at the public house.

3dly. The "carrying" to gaol in section 1. applies to the time of his being lodged there; but if the putting him on the coach is such a "carrying," then

4thly. It was his duty to have nominated a house, and as he neglected to do so, he was legally taken to prison within the 24 hours. The object of the act was, that the party arrested should nominate, in order to give him an opportunity of fixing a place, where he would most easily get bail. [*Bayley* B. In many cases the 24 hours would be occupied in getting to the gaol.] The words, unless the person arrested "refuse to be carried to some house of his nomination," imply his nomination of a house, before he can be called on to go there or can refuse to do so when so called on. [*Bayley* B. The officer might say, name any house you wish to go to. If the answer was 'I will not,' he might take him to gaol.]

Hill and *Waddington* supported the rule. The defendant's argument at the trial was, that the plaintiff had no right of action against the defendant, because

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the act done made *Leadbeater* liable to the penalty under s. 12. as a principal actually doing the wrong. If *Watmough* was a principal in the execution of this process, he should have begun and continued it throughout. At all events the officer who received the process had no power to hand over the execution of it to any other person to execute; and if he did, he was liable for the act of the person thus entrusted as his agent, if, though of a penal nature, it was cognizable in a civil proceeding. *Attorney-General v. Siddon* (a), *Rex v. Gutch* (b), *Rex v. Almon* (c). The case of *Woodgate v. Knatchbull* (d), shows the sheriff to be liable for the extortion of his bailiff. [*Bayley* B. No doubt he is then liable to treble damages by 29 *El. c. 4*. That is on the principle of *respondeat superior* (e), and the sheriff would hold his bound bailiff liable to him, as principal, for any act of the bailiff's follower.]

But, secondly, the learned judge misdirected the jury by putting it thus in the negative, (though those are the words of the act,) *viz.* that they were not to find for the plaintiff unless they were satisfied that he went to the *Granby* without his free and voluntary consent. For his affirmative and express consent was necessary, nor can his tacit acquiescence amount to that, when he might not know he was entitled to dissent. The inequality of his situation with the bailiff at the time of the arrest must be considered. Then it was the bailiff's duty to call on the plaintiff to nominate a safe house to be taken to, and the plaintiff was not bound to do so of his own accord, and could not "refuse to be taken" till he had been so called on. The preambles to section 1 and section 3 show the pains of the

(a) *Ante*, Vol. I. 41; and see *Attorney-General v. Riddell*, Vol. II. 523:

(b) 1 *Moody & M.* 433.

(d) 2 *T. R.* 148.

(c) 5 *Burr.* 2686.

(e) 4 *Inst.* 114.

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legislature to provide against the party's possible ignorance of the act passed for his protection, by thus expressly superseding the common law maxim *ignorantia legis non excusat*. It should have been left to the jury in the affirmative, whether they were satisfied that he was taken to the *Granby* with his voluntary consent? For upon the words "without his free consent," it lay on the defendant to show affirmatively that he did so consent.

The "carrying to prison" is satisfied by putting the plaintiff on the coach, which is a beginning to carry.

Lastly, the learned judge misdirected the jury in saying that the officer might take the party to gaol within 24 hours, unless he nominated a house to go to during that time, and the party was bound so to nominate. But when does the duty of so nominating arise? At the instant of making the arrest? Now if that can be contended for, there is no dividing point as to the time, and the consequence would be, that a party arrested and not naming a house at the instant, would be held to "refuse" so as to be legally carried to prison at once. But the plaintiff must refuse, and not merely neglect; for refusal to nominate implies a previous application to do so. Here the officer proposes to take the plaintiff to the *Granby*, and the plaintiff merely complies.

Cur. adv. vult.

BAYLEY B.—In this case two charges are made against the defendant for breach of his duty as a bailiff, under 32 G. 2. c. 28. The first, for carrying the plaintiff to a tavern, without his free and voluntary consent, after he had been arrested by the defendant. And the next for carrying him to prison within 24 hours from the time of that arrest. The short facts of the case are these: a warrant to arrest the plaintiff was

directed to the defendant and *Watmough*, and delivered by the sheriff to the defendant to be executed. *Watmough* was an assistant to the defendant, and his name was occasionally introduced into warrants directed to the defendant. *Leadbeater* was another assistant of the defendant, and arrested the plaintiff, saying, "you must go with me to the *Granby*;" to which the plaintiff replied, "very well." He was taken there accordingly, and remained there till the next morning, when he was transferred from *Leadbeater's* custody to that of *Watmough*, who put him on the top of a coach to take him to the county gaol. On these facts it was in the first place objected at the trial, that the act of *Watmough* in putting the plaintiff on a coach, and carrying him to prison, was an act for which he alone was responsible, and therefore could not affect the defendant *Pearson*. That objection was taken at the time of the trial and overruled, as we think, rightly. The arrest was properly *Pearson's* arrest. Though *Watmough* was named in the warrant, and was also the assistant of *Pearson*, it must be taken that what he did in this case was done as such assistant. Now the defendant saw the fact of the plaintiff's being put on the coach to be taken to prison, for it appears that he looked from his own house at a little distance off towards the plaintiff's door, and made some signs to the plaintiff's children assembled there in distress at the removal of their father. It clearly appears to me, therefore, that the defendant having thus recognized the act of *Watmough* in removing the plaintiff, it became his act.

Another question was made, whether the putting the plaintiff into the coach within 24 hours, was to be taken as a carrying to prison within that time, contrary to the stat. 32 G. 2. c. 28. That question was with great propriety forborne to be much discussed at the

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bar, for the object of the act was to give the party 24 hours to procure bail, and if in that intermediate time an officer was to be at liberty to arrest the party, and put him in a condition of being carried away to prison, it would be breaking into the 24 hours allowed for settling the arrest by means of friends, and in many instances would deprive him of any advantage whatever, for that whole time might thus be expended in travelling.

This brings me to the consideration of a third question, namely, the reasonable construction of the statute in question, as to taking the party arrested to a tavern without his free and voluntary consent. The act is for the relief of persons in the situation of debtors, as to the imprisonment of their bodies, and has in sect. 1 one clause against carrying a person arrested to a tavern without his free and voluntary consent, another against carrying him to prison before the expiration of 24 hours. The wording used is material, for the latter clause contains the peculiar expression of "refusal." The language is, "that no sheriff, bailiff or other officer whatsoever, shall at any time hereafter convey or carry, or cause to be conveyed or carried, any person arrested to any tavern &c., or to the private house of any officer, or of any tenant or relation of his, without the free and voluntary consent of the person arrested, &c. nor shall carry any such person to any gaol or prison, within 24 hours from the time of such arrest, unless such person so arrested shall refuse to be carried to some safe and convenient dwelling-house of his own nomination and appointment, and then and in such case it shall be lawful for any such sheriff or officer to carry the person so arrested and refusing to be carried to such safe &c. dwelling-house as aforesaid, (that is, of his own nomination) to gaol." Section 3 furnishes the right and fair rule by which we must decide this case.

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It begins thus: "to the intent that no person may suffer by reason of his ignorance of the provisions of this act, every sheriff, &c. is to deliver a printed copy of the clauses relating to bailiffs in the act to every such bailiff, and must make it part of the condition of every bond, given to any such sheriff, &c. by such bailiff, &c. that the bailiff shall show and deliver a copy of the said clauses to every person to be arrested, and if such person shall be taken to a tavern, then that he shall be permitted to read them over, before any meat, &c. is called for in any such tavern." The first matter for consideration is, What is the fair construction of the words, "without his free and voluntary consent?" It is assumed by the legislature that the party arrested may be ignorant of what his rights are, and therefore the act provides that it shall be part of the officer's duty to let him know those rights. If the party, to the knowledge of the officer, is aware of them, such strong evidence of the officer's so informing him, and of his free and voluntary consent, may not be required as in other cases; but that greatly differs from our being satisfied under these words with evidence that the party made no objection. If the legislature ever meant that the making no objection should be sufficient, it would have used language to that effect. It would not have employed words so strong as the expression "without his free and voluntary consent." From that expression we must assume it to have been meant that the party should have the opportunity of saying whether he will go to a house or not, and should be told that he may object to going to a tavern. With this view an act of parliament such as this is required to be put into action by the officer. His duty under it is to give the party arrested a knowledge of his rights, and to call him to an active exercise of his own will with respect to them. It is not enough that the officer should merely make out in a

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negative manner that the taking the plaintiff to a tavern was not against or not without his consent.

The 5th and last question is, what construction should be put upon the words, "unless such person shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment." It seems to me that it is the duty of the officer to ask the party arrested, whether he will nominate such a safe and convenient dwelling-house, and to tell him that if he will not nominate or appoint some such dwelling-house, it is the duty of the officer to convey him to gaol. I come to this conclusion from the strong words contained in the act of parliament, which are not "if the party shall neglect or omit," but "unless he shall refuse." Neither neglect or omission are tantamount to a refusal. A party might neglect or omit to make such an appointment, from his total ignorance of any right to make it. The intention of the legislature is couched in such strong language in that part of the clause, that I think there must be an actual refusal by the party arrested to nominate any house, in order to bring him within the operation of the act, and to give the officer the right to carry him to prison. The officer must ask the party the question suggested, so that the latter may exercise his discretion, or it seems to me that he cannot be said to refuse to be carried to a house of his own nomination. I am, therefore, of opinion that this rule must be made absolute.

VAUGHAN B.—Under the circumstances of the case it seems to me that there ought to be a second inquiry, that the facts bearing on the question of consent may be more completely elicited in consequence of this discussion. It was insisted that this was a remedial statute, and should be construed as such; but it is also penal. It has been said that the question to the jury was improperly put in the negative form, whether the

plaintiff was taken to the public-house without his free and voluntary consent. Though it was necessary that the jury should find whether the party was taken with his free and voluntary consent, no particular form of words seems requisite to elicit that finding. The other question is of greater moment, and by sending the case to a new trial the parties may have an opportunity of putting it on the record if they think fit. The act, by section 3, recognizes the old and necessary presumption of law, that parties are cognizant of their rights and liabilities, by making it matter of special provision that the party arrested shall be informed of them in the particular manner there pointed out. Whether it is the bailiff's duty further to inform the party arrested of his right to nominate a house to be taken to, appears a grave question. Declining to nominate, or not nominating, may amount to a refusal within the act, where the party knows or is informed of his rights.

BOLLAND B. concurred.

GURNEY B.—It has long been the policy of the law, that certain means of complaint should be given to parties subject to arrest and imprisonment, in order to protect them against the abuses incident to their situation. The powers of arrest given to the sheriff had been found by experience to be abused by the sheriff's officer for the purposes of oppression and extortion. To repress these practices, the 22 & 23 Car. 2. c. 20. was passed. That act is entitled "an act for the relief and release of poor distressed prisoners for debt," and contains in s. 9 some provisions similar to those before us, but it is imperfect in many respects, and among others, in affixing no specific penalty for the non-observance of its provisions. Nearly ninety years afterwards, the misconduct of sheriff's officers not being

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reformed, the 32 G. 2. c. 28. was passed to supply its deficiencies. The title and preamble of this latter statute shows its object, and are to be understood in their plain and obvious sense. (The learned baron stated the facts.)

It was contended, in the first place, that the evidence did not touch the defendant, so as to make him liable; that was so contended in order to compel *him* to call *Leadbeater* to prove that what was complained of was not done by the defendant, but by the witness. But it seems to me that great injustice is often done by putting into the box, as a witness, the sheriff's officer, who if not the nominal is the real party in the cause; and if this statute had been violated, a plaintiff ought to have the ready means of recovering against the officer of the law who executes any process. The evidence of *Leadbeater* shows there was dictation on the one hand, and submission on the other, which is not what the statute meant by the free and voluntary consent of the party. The party is to have his option and be apprized that he has it. This is a species of case in which the knowledge is all on one side, and in which the legislature has thought that a person liable from his situation to especial oppression should be the object of similar protection. Though it may be doubted whether the officer is compellable to produce the printed clauses, before he has taken the party to a public house, he is not to take him there without his free and voluntary consent. The very contrary appears from this evidence. With respect to the second point, it has been the object of the act to enable the debtor to get bail. If the defendant's construction of the act is right, the party arrested may be sent off immediately upon the arrest. That would indeed be to put a strained construction upon this statute. He is on the contrary to have the whole 24 hours to get bail, and whether he is taken away so as to make a beginning to

be carried at the end of one or of twenty-three hours, the officer is equally liable. I am also of opinion that the nomination of a house by the party arrested must be asked for, or otherwise he cannot be said to refuse it.

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Rule absolute.

WILKINSON *against* MALIN.

A CHARGE for a good jury on executing a writ of inquiry had been allowed by the master on taxation. *Goulburn* Serjt., in support of a rule to review the taxation, contended that the plaintiff was not entitled to this item, citing *Dax*, 63, edit. 1831. *Adams* Serjt. and *Hunfrey* contra.

Since Reg. Gen. Hil. 1832, No. 101, a charge for a good jury on an inquiry is allowed.

Per Curiam.—The master certifies to us, that since No. 101 of the general rules issued in *Hilary* 1832, [*ante*, Vol. II. §50,] the practice has been to allow this payment. As, before that rule, the obtaining a good jury was the act of the party, no such allowance was made; but since that rule it is entirely in the discretion of a judge, upon summons, to grant or refuse such a jury.

Rule discharged as to that item.

Goulburn Serjt. for the defendant, afterwards moved to nonpros a writ of error brought by him, *Milborn v. Copeland* (a), and without payment of costs, the writ not having been returned, *Salt v. Richards* (b).

If a defendant nonprosses his own writ of error, it must be on payment of costs.

Per Curiam.—If the defendant can nonpros his writ of error, he will do it on his own risk; but if he cannot do so without our authority, we think it reasonable that he should pay the plaintiff any costs to which he may have been put.—Motion refused (c).

(a) 1 M. & S. 104.

(b) 7 East, 111.

(c) These points were decided in *Michaelmas* term 1832.

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ROGERS *against* JONES.

Country bail must state in their affidavit of justification that each of them is *worth* the sum required in the terms of *Reg. Hil. 2 W. 4. No. 19.* and time to amend an affidavit stating them to be possessed, will not now be allowed.

IN this case the affidavit of justification of bail sworn in the country stated them to be *possessed* of property to a certain amount, without further stating that each of them was *worth* double the sum for which defendant was held to bail, above his own just debts, or every other sum for which he might be then bail, according to *Reg. Gen. Hil. 2 W. 4. No. 19.* [Vol. II. 342.]

Channel objected to the bail, citing *Darling v. Hutchinson* (a), decided since the rule of *Hil. 2 W. 4.*

J. Jervis supported the affidavit as complying with *Reg. Gen. Trin. 1 W. 4. No. 3.* [Vol. 1. 521.].

Per Curiam.—Taking the two general rules together, it may be contended, that the framer of them contemplated the terms “possessed” and “worth” to be synonymous; but we are of opinion that the affidavit ought to have stated that the bail were “worth” double the same sum sworn to in the terms fixed by the latter rule of *Hil. 2 W. 4.* We will grant time to amend the affidavit, on the understanding that after this term no such indulgence will be granted.

(a) 2 Tyrw. 491. E. 1832.

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HUME and Others *against* LIVERSIDGE and Others
(his Bail).

IN debt on a bail bond, the declaration averred that the writ against *Liversidge*, before the delivery thereof to the sheriff of *Surrey* to be executed, was duly marked and indorsed for bail for 43*l.* 4*s.* 4*d.*, according to the form of the statute in that case made and provided.

Plea, *actio non*, because they say that no proper affidavit of the alleged cause of action of the said plaintiffs against the said *G. Liversidge*, as to the said sum of 43*l.* was made and filed of record in the said court, before the issuing of the said supposed writ in the said declaration mentioned, according to the form of the statute in such case made and provided: concluding with a verification.

Special demurrer, alleging for grounds, that the defendants, by giving a bail bond, admitted the writ to be duly indorsed for bail according to the statute; that it was not necessary that there should have been an affidavit of the alleged cause of action of the plaintiffs against *G. Liversidge*, the statute requiring such affidavit being only directory (*a*), and it being competent to the court to require bail, though no such affidavit should have been filed; and that the plaintiffs cannot take any proper issue on the said plea; and that the said affidavit is not by the practice of the court affiled of record; and also for that the plea began and concluded with averments that the plaintiffs ought

Issues tendered in pleading must not be alleged argumentatively, but in terms on which a direct issue can be taken. Thus, where in debt on a bail bond, the plea stated that no proper affidavit of debt was filed in the original action, it was held bad on demurrer.

(a) See per Lord Mansfield, *Whiskard v. Wilden*, 1 Burr. 330; but see 10 B. & C. 213.

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not to have or maintain their aforesaid action thereof against the defendants, and not averring, as it should have done, that the said plaintiffs ought not to be charged with the said debt, by virtue of the said writing obligatory; and joinder.

*Addison* was in support of the demurrer, but the Court called on

*Erle* to support the plea. Non debito modo electus is held a good return to a mandamus to admit a corporator. [*Bayley* B. That traverse can only be taken at large as contended for, where the writ or a previous pleading alleges that the defendant was debito modo electus (a). If it was desired to object to the insufficiency of the affidavit, it should have been set out with an allegation that there was no other.] *Rogers v. Jones* (b) and *Hughes v. Jones* (c) show that an improper affidavit avoids the arrest, so that no action lies for an escape. [*Bayley* B. In those cases the supposed officers before whom the affidavits were made, had no authority to administer oaths, so that though the oaths had been taken, no affidavits existed.] The use of the word "proper" is not assigned as a cause of special demurrer, and the word is mere surplusage amounting to "due" or "duly." The affidavit, if wholly void, cannot be said to be "proper."

LORD LYNTHURST C. B.—Consistently with this plea the affidavit might be defective in substance, and therefore void, as, *e. g.*, for want of a jurat; or only so far irregular in matter of form as would have entitled the defendant, *Liversidge*, to have applied promptly to the discretion of the court to set aside the proceedings in the original action. Then the plaintiffs could not take

(a) *Rex v. Lyme Regis*, Doug. 86.

(b) 7 B. & C. 86.

(c) 1 B. & Ad. 388.

issue upon the allegation that no proper affidavit had been filed.

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**BAYLEY B.**—Suppose the affidavit to have contained such a defect as would have grounded a motion by the defendants to be discharged on filing common bail, or to give up and cancel the bail bond, can that defect, so long overlooked in the original action, be set up as a defence to this? For example, the affidavit might have omitted to state that money lent by the plaintiffs to the defendants, or had and received by the defendants, was lent or was had and received at the defendants' request, which omission would have rendered it "improper" within this plea. If the plaintiffs had taken issue on it, the question of the propriety of the affidavit must have been left to a jury. That shows that a proper issue could not be taken on this plea, and that the plaintiffs' proper course was to demur.

**VAUGHAN B.**—The terms of the plea import the existence of *an* affidavit, but tender an issue as to its propriety. Now, on that subject, the court, and not a jury, is to judge. In the cases cited, though oaths were taken, no affidavits at all were sworn. Here, for all that appears, an affidavit was sworn; and it has been used and acted on without any interference by the defendants in that early stage of the proceedings in which its defects might have been properly brought before us on motion.

**GURNEY B.** concurred.

Judgment for the plaintiffs (a).

(a) Had the allegation of the due indorsement of the process for bail been unnecessarily followed by a statement that the affidavit in that behalf had been duly filed of record, (see *Nightingale v. Wilcason*, in error),

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10 B. & C. 202, and the previous dicta in 1 Saund. 296, n. &c. &c.) that statement must notwithstanding have been proved at the trial by producing the original affidavit, *Webb v. Herne*, 1 Bos. & Pul. 281. See per *Bayley* J. 10 B. & Cr. 213; unless the declaration stated who made the affidavit, in which case the office copy would have sufficed, *Casburne v. Reid*, 2 B.M. 60.

As to the force in pleading of the word *duly*, and other similar words, alleging no matter of fact, see 9 Co. 25 a; 1 Burr. 540; Doug. 79. 180; 2 Smith's R. 223; 8 East, 148; 2 Marsh, 308; 10 East, 64, note b; 16 East, 39. 42; 4 B. & A. 295; 3 Camp. 60; 1 Stra. 516; 2 Id. 919; 2 Barnardist. 16. 73; Peake C. N. P. 155; 6 Taunt. 645; 4 Bing. 114; 5 D. & R. 72; 7 B. & Cr. 468; 8 B. & C. 124; and 10 B. & C. 207; *Nightingale v. Wilcoxon*.

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### PROUDLOVE *against* TWEMLOW.

Where a landlord distrained growing crops under 11 G. 2. c. 19. s. 8. but sold them before they were cut: The remedy was held to be under section 19, in an action of trespass, or on the case, for the special damage sustained by that irregularity and no more. In such an action on the case with a count in trover, the landlord was held entitled to deduct the rent due to him from the difference between the price which might have been obtained had the sale been regular, and that which was obtained under the irregular sale; so that where no such difference existed, from the crops having been sold for their full value, while the rent due exceeded the produce of that sale, the tenant recovered nominal damages only.

CASE for irregular distress. The declaration contained several special counts, and a count in trover (a).

(a) The first count was on 2 IV. & M. c. 5. s. 2. for selling the distress before five days had elapsed after it was made. The second count was for selling growing crops before they were cut, gathered, and appraised, and for less than the best price. The third count alleged the duty of the defendant to have had the crops appraised when ripe, and sold for the best price which could have then been obtained. Breach, that the defendant sold them before they were ripe, and before they could be appraised, and for a much less price than they would have fetched if appraised and sold when ripe. Fourth count, that defendant did not cause the growing crops and effects distrained to be appraised by two sworn appraisers, but sold them without such previous appraisement. Fifth count, for not selling for the best price. Sixth count, on 52 H. S. c. 4. for making an excessive charge for the expenses, costs, and charges of the distress. Seventh count, for distraining for more rent than was due. Eighth count, for taking a great and unreasonable distress. Ninth count, that defendant, after distraining goods of more than sufficient value to satisfy the rent due and the expenses of distress, retained possession thereof for five days, and then quitted possession



At the trial at the last *Cheshire* assizes, before Lord *Lyndhurst* C. B. it appeared that on the 18th of *June* 1831, the defendant had distrained the plaintiff's goods and also his growing crops for 120*l.* rent due on the previous 25th *March*, that he seized the crops before they were ripe, and sold some of them while standing, and without appraisement, for rather more than their full value when ripe, to a purchaser, who, after a month's time allowed him by the conditions of sale, cut and carried them off.

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The jury found for the plaintiff with damages of 1*s.* on the special counts, and for 97*l.* 11*s.* the value of the crops on the count in trover, the Chief Baron giving the defendant leave to move to reduce the damages on the last count to nominal. A rule was obtained accordingly by

*Cottingham*, who contended that the rent due being more than the value of the corn taken, the plaintiff was entitled to nominal damages only; and cited *Notts v. Curtis* (a), and *Briggins v. Goode and Others* (b).

*Pollock* and *J. Jervis* showed cause. In an action on the case for an irregular distress of goods legally distrainable, the only damages recoverable are, for the difference in their value, if sold after the regular steps taken, and their price if sold irregularly.— Upon the special counts in case, therefore, the defendant was entitled to deduct his rent due from the

of them, but afterwards distrained them again for the same rent, refused to return them to the plaintiff, and, after keeping them seven days, disposed of them to his own use, whereby the plaintiff was annoyed in the occupation of the premises and in his carrying on his business therein, and was put to the expense of the two distresses and lost his goods. Tenth count, like the ninth, alleging that defendant, having sold part of the first distress, quitted possession of the remainder, which he afterwards distrained again.

(a) Ante, Vol. II. 449, n.

(b) Id. 447.

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amount of the damages so measured. But in trover it is different, for the sale of the unripe standing crops being wholly void for want of an appraisement, which could not be made till they were ripe, the rights of property and of possession concurred in the plaintiff, so as to support trover. The sale being wholly void, no action on the case was maintainable under 2 *W. & M.* sess. 1. c. 5. for any irregularity in it; *Owen v. Legh and Another* (a): but in trover the plaintiff on making out his title has a right to recover for the whole value of his goods, which, as the sale was illegal, remain his. If the damages are reduced as moved for, the landlord is not estopped from suing for the same rent (b).

[Lord *Lyndhurst* C. B. What damage has the plaintiff sustained? The landlord was lawfully in possession of the standing crops, and might have appraised and sold them when ripe; the irregularity is, that he sold them before that time, and therefore before they could be appraised. Before 11 *G. 2.* c. 19. s. 19. that irregularity would have made this defendant a trespasser ab initio; but since that act the injured party is to recover in an action on the case for the damage sustained. What rule of law then prevents the landlord from deducting from that damage the rent due to him?]

Section 19 of 11 *G. 2.* c. 19. appears by the recital in its preamble to be confined to goods which were distrainable at common law, or at most to corn or hay cut and lying in barns, &c. which had been made distrainable by 2 *W. & M.* sess. 1. c. 5. s. 3. Now, as growing crops can only be distrained under section 8 of 11 *G. 2.* c. 19. a landlord distraining them must pursue its enactments, or will become a trespasser, as before section 19 of the latter act became part of the law. Then the defendant here not having pursued

(a) 3 *Bar. & A.* 470.

(b) See *Efford v. Burgess*, 2 *Moody & M.* 23.

the words of the statute, the plaintiff has never lost the right of property and possession of the corn, and may recover its whole value accordingly.

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*Jones Serjt. and Cottingham* in support of the rule, were stopped by the court.

**LORD LYNTHURST C. B.**—I am of opinion that the present case is within section 19 of the statute 11 G. 2. c. 19. and that the distress was originally lawful, though the subsequent sale was premature and irregular. That section expressly provides that the party aggrieved by any irregularity or unlawful act of the distrainer committed after distress made for rent justly due, shall recover satisfaction for such special damage as he may have sustained "and no more." Then as this corn sold for its full value, and more than the sum it fetched was due for rent, the plaintiff can only recover nominal damages.

**BAYLEY B.**—By section 8 of 11 G. 2. c. 19. growing crops may be distrained and sold in the same manner as other goods and chattels; then I cannot doubt that the subsequent section 19 was intended to apply to every thing so previously made distrainable. Then the plaintiff has only a claim to damages according to the rule laid down in sect. 19, viz. to such as arose from the unlawful act, which took place after the distress had been regularly made, and would be entitled to recover the difference between the produce of the crops if sold regularly, and the sum they actually sold for. Here there could be no such difference, for the crops sold for at least as much as they were worth. The damages therefore should be reduced to 1s.

The rest of the court concurred.

Rule absolute.

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MAHONEY *against* FRASER.

If a plaintiff has a right to a new trial on the ground of excessive damages, it will be granted generally, and without being limited to that question only.

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, and expelling him from it. A jury had found a verdict for the plaintiff for 1000*l.* damages. It having been shown that the plaintiff's interest as lessee of the house was worth that sum. A rule for a new trial was obtained by *Hill*, on several grounds, including that of excessive damages; and on showing cause by

*Hutchinson*, the *Court* stated that there must be a new trial on that point. He then moved to restrict the inquiry to that point. But,

*Per Curiam*.—As the plaintiff has a right to a new trial in respect of circumstances which occurred at the first trial, the inquiry cannot be limited or confined, though had it been only a matter of indulgence it might.

Rule absolute for a new trial generally on payment of costs (a).

(a) See *Bernasconi v. Farebrother*, 3 B. & Ad. 373.

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HIRST *against* PITT.

Since 2 *W.* 4. c. 39. (uniformity of process act,) no declaration in the Exchequer should state any debt to the king in its commencement, or contain the old quo minus clause at the end.

**THE** causes of demurrer specially assigned were, that the declaration commenced without alleging that the plaintiff was a debtor to the king, and that the quo minus clause was omitted at the end of it.

to the king in its commencement, or contain the old quo minus clause at the end.

*Mansel* supported the demurrer by saying that *Reg. Gen. M. 3 W. 4. No. 15. [ante, p. 5,]* made in pursuance of 2 *W. 4. c. 39. s. 14.*, only provided a new form for the commencement of a declaration, which like the present followed the new writ of summons provided by that act, but left the conclusion as before. In *Nicklen v. Dickens* this court held the want of the same clause in the commencement fatal.

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LORD LYNTHURST C. B.—Since stat. 2 *W. 4. c. 39.* there can be no doubt on this question. In order to place the suitor in a situation to proceed in this court, it was formerly necessary that the declaration should correspond with the writ of *quo minus*, on which the jurisdiction hinged, by suggesting a debt to be due by him to the king, and his being the less able to pay it. But as that statute now confers on this court general jurisdiction by writ of summons, the old jurisdiction by *quo minus* is ended; that writ no longer exists, and the former statement has become wholly unnecessary. So in the King's Bench the defendant is no longer stated to be in the custody of the marshal, except he is actually a prisoner. *Nicklen v. Dickens* was determined in *Trinity* term 1832(a), during the existence of the *quo minus* process.

The other Barons concurred.

Judgment for defendant.

(a) As 2 *W. 4. c. 39.* came into operation in *Michaelmas* term 1832, *Nicklen v. Dickens* was omitted in the reports of *Trinity* term 1832.

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BARBER *against* ROLLINSON.

Defendant having charged the plaintiff with felony, the plaintiff was taken up for it under a justice's warrant. At the hearing before the justice the plaintiff was let go on his promise to re-appear in a week. Upon which the defendant said he had another charge of forgery against him. The plaintiff was stopped by an officer, and again put to the bar, but dismissed on a similar promise:—Held, that the plaintiff's remedy against the defendant was in case, and not in trespass.

**TRESPASS** for assault and false imprisonment. Plea, not guilty. The plaintiff had been taken up under a magistrate's warrant for a felony charged against him by the defendant. On being brought before the magistrate the defendant did not appear to support the charge, and the plaintiff was discharged, on his own promise to re-appear in a week, but just as he was going from the office the defendant said, "I have a charge of forgery against him now." The defendant having been stopped by an officer, and put to the bar again, that charge was then gone into, and he was again discharged on promising to appear there the next day, which he did. At the trial at the sittings at *Westminster* the plaintiff's counsel contended, that the bringing the plaintiff back on a second charge was a distinct act from that taking which was protected by the warrant, and was consequently the legal subject of an action of trespass; but Lord *Lyndhurst* C. B. was of opinion that the warrant was an answer to every charge against the defendant as laid in trespass, and that an action on the case would have been the only remedy for any malicious charge. Nonsuit accordingly: which

*John Williams* now moved to set aside. The first charge was over at the time the plaintiff was stopped in consequence of the defendant's statement: then as that stopping took place without the direction of the magistrate, and before his authority began to intervene, it was an act of trespass by the defendant himself, and was not covered by the warrant. [Lord *Lyndhurst* C. B. The defendant *did* nothing more than saying before the magistrate, "I have a charge against that man for forgery."] The period between the first discharge and

the plaintiff's being stopped in going towards the door, distinguishes the transactions. [*Bayley* B. The plaintiff was still before the magistrate when the defendant used the expression, which the magistrate acted on as a fresh charge.] Had a third person been sued in this form of action, he must have justified by pleading specially that a warrant had been issued, and that he acted in aid of the party to whom it was directed.

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*LORD LYNTHURST* C. B.—The defendant only set the law in motion, and for improperly doing so is liable to an action on the case; but I still think that no act of trespass by him was proved.

*BAYLEY* B.—All that the defendant did was to make the original charge on which the warrant issued. In pursuance of that order of the law the plaintiff was seized in the absence of the defendant, though had he been present he would have been protected, as acting in aid of those who were executing the warrant. Then while the plaintiff is before the magistrate under the warrant against him, the defendant says he has another charge against him. That was a part of the same proceedings, and no act of trespass.

*Per Curiam,*

Rule refused.

*BOULTER against ARNOTT.*

**A**SSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before *Vaughan* B. at the *Guildhall* sittings, it appeared that the action was furnished by the purchaser, who saw the packing, and requested the seller to keep them for him till he could call, pay for, and take them away. Held; that on a count for goods sold and delivered, the plaintiff was rightly nonsuited.

Goods were sold for ready money, and packed up at the seller's house in boxes

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brought for the price of cigars bought by the defendant from the plaintiff, for ready money terms, the plaintiff having refused to give credit. The defendant had at first desired the cigars to be packed and sent to the *Tun, Jermyn Street*, but having sent his boxes to the plaintiff's house for that purpose, he looked at the cigars there while being packed, and taking some of them up countermanded his first direction, requesting the plaintiff to keep them, saying he would call in a day or two to pay for them, and take them away in his gig. The learned Baron nonsuited the plaintiff on the ground that no delivery was proved, and that there was no count for goods bargained and sold, but gave leave to move to enter a verdict for the plaintiff for 25/., the price of the cigars.

*Bompas* Serjt. moved accordingly. The delivery to the defendant was completed by the plaintiff's filling the boxes furnished to him by the defendant, which then became the defendant's warehouse for that purpose, so as to entitle the plaintiff to immediate payment, and to preclude him from any right to unpack them. In *Hodgson v. Le Bret (a)*, the mere writing by the defendant of her name upon a piece of linen, part of the articles bought by her, was held such an appropriation of that piece as would sustain a count for goods sold and delivered. So in *Anderson v. Scot (b)*, the plaintiff's marking his initials in the defendant's presence on the casks of wine bought, was held sufficient. [Lord *Lyndhurst* C. B. In the latter case the purchaser exercised a dominion over the goods, which amounted to an acceptance within the statute of frauds. *Bayley* B. In the cases cited Lord *Ellenborough* held the marking to be sufficient evidence, not of a delivery to the defendants, but of such an acceptance

(a) 1 Camp. 233.

(b) *Ibid.* 235, n.



by them as would take each case out of the statute.] The defendant might have maintained an action against the plaintiff for not delivering them.

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LORD LYNTHURST C. B.—Whatever was done as to packing these articles must be taken with reference to the contract of sale, which was for ready money. Now that contract imported that the purchaser was to pay the money on the delivery of the goods; therefore it could never be intended that by the packing them in the defendant's boxes on the plaintiff's premises, they should then pass into the defendant's possession by delivery without payment of the money. Besides, it appears here that the cigars were not to be taken possession of by the defendant till paid for. Had the declaration contained a count for goods bargained and sold, the plaintiff might have recovered.

BAYLEY B.—I am of the same opinion. The plaintiff at no time parted with the possession of these goods. Whether the acts of marking or packing for the vendee in his presence will not operate as an acceptance by him under section 17 of the statute of frauds, is quite another question. But the question on this declaration is, whether there was a delivery to the vendee? Now the plaintiff never did so deliver them, and the defendant had never any right to take them out of the plaintiff's possession till they were paid for. I do not assent to the proposition that the defendant's boxes are to be considered as his warehouse, and think that the plaintiff might consider his goods as still being in his own possession. *Goodall v. Skelton* (a) is directly in point against the plaintiff's right to recover in this action. There the plaintiff agreed to sell wool to the defendant, who paid earnest. The

(a) 2 H. Bl. 316.

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goods were packed in cloths furnished by the defendant, and were deposited in a building of the plaintiff's till the defendant should send for them, the plaintiff declaring that the wool should not go off his premises till he had the money for it; and the Court held, that no action for goods sold and delivered would lie for want of delivery.

VAUGHAN B.—The defendant requested the plaintiff to keep the goods till he called and paid for them and took them away. The plaintiff was not bound to part with them till the price was paid.

*Per Curiam,*

Rule refused (a).

(a) See *Simmons v. Swift*, 5 B. & Cr. 857; and 2 Bla. C. 448, citing Hobart, 41.

### CRUMP *against* ADNEY and Another.

Where it was agreed that in case an arbitrator should award a certain annuity to be bought by executors for the widow of their testator, he "should or might" award the same, with a proviso that in case of a deficiency of assets of the

**A**SSUMPSIT. Whereas a certain agreement, dated 30 March 1831, in writing, then and there made between the plaintiff of the one part, and the defendant of the other part, reciting that *E. Crump*, then deceased, being a widower, made and duly executed his last will and testament in writing, dated on or about 8 Nov. 1828, and thereof appointed the said *J. Adney*, his son-in-law, and *Thomas Onions*, joint executors. And further reciting, that the said *E. Crump*, being still a widower, on or about 16 July 1829 intermarried with the plaintiff, and on or about 20 Jan. 1830, being testator the annuity should abate in a certain specified proportion:—Held, that under these words it was imperative on him to insert that proviso in his award.

then in a weak state of body, gave, as it was alleged, instructions to *W. F.* his medical attendant, to procure a codicil to be made to his the said *E. Crump's* will in favour of his wife, and that the said *W. F.*, on the — day of the same month of *January*, attended at the office of Messrs. *P.* solicitors, and requested them to prepare such codicil, which, for reasons then given to the said *W. F.* they declined doing, and that the said *W. F.* afterwards, on the 30th day of the same month of *January*, waited upon *T. G.* solicitor, and gave him several verbal instructions for such intended codicil, which instructions were then, at the request of the said *W. F.* taken down in writing by the said *T. G.*, and that the same instructions were as in the said agreement in that behalf mentioned and set forth. And further reciting, that the said *E. Crump* departed this life on or about 14 *Feb.* 1830, without having executed such instructions for a codicil, or the same having been otherwise reduced into any other form for that purpose. And further reciting, that the plaintiff had entered a caveat against the proof of the said will, unless the paper of instructions was proved therewith, and that disputes had arisen between the said parties relative thereto. And further reciting, that the said *J. Adney* and his family, with the said *T. Page* and his family, being materially interested in the said will of the said *E. Crump*, had agreed with the plaintiff to purchase in the public funds such annuity (if any such should be awarded) for her life, or else in the joint names of trustees to be appointed by the thereafter-named *C. B. A.* such a sum of 3*l.* per cent. consols as would produce from the dividends such annuity as should be named, settled, and fixed by the said *C. B. A.* upon due consideration of the facts aforesaid, and of such other facts and cir-

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cumstances as might be adduced and proved before him as could entitle the plaintiff to any such annuity, or otherwise to any share or thirds of the personal estate of the said *E. Crump*, deceased, and of the charges of establishing the said paper of instructions, as far as the personal estate was or might be affected thereby, and of the said paper being imperative as far as the real and personal estate was included therein, or otherwise howsoever, and of the advantage which the said parties mutually had in avoiding legal proceedings, and in saving the expenses thereof; and all proper abatement and allowances being made in respect thereof, such annuity, if any such should be awarded, to be in lieu of every provision intended the plaintiff by the said paper of instructions, and in lieu of all thirds at common law to which the plaintiff might otherwise be entitled out of the personal estate aforesaid, but in no-wise to affect her claim to dower out of the real estates late of the said *E. Crump*, and to be paid and made good by the defendants as aforesaid to the plaintiff, from the day of the death of the said *E. Crump*, until the actual purchase of the said annuity; and in case the said *C. B. A.* should by his award direct the dividends only of the money to be invested to be paid to the plaintiff, that then and in that case, upon the death of the plaintiff, the said stock, funds, and principal money to go and belong and be transferred by the said trustees to the defendants as aforesaid, their executors &c. It was thereby witnessed, that for the purpose of carrying the intention of the said parties into execution, (here followed an agreement of reference, in the usual form, to *C. B. A.*, of *Shrewsbury*, esq. barrister at law.) And it was also then and there further agreed, in writing, by and between the plaintiff and the defendants, that in case the arbitrator should

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award any such annuity as aforesaid, he *should or might* award the same, with a proviso that in case of a deficiency of assets of the said testator, the annuity, or the fund from which the same should arise, should abate in the same manner as if it were a provision contained in the said will. Mutual promises. Averment, that the said *C. B. A.* having taken on himself the burden of the said arbitrament, and upon due consideration of the facts aforesaid, and of such other facts and circumstances as were adduced and proved before him, duly made his award in writing, under his hand, of and concerning the premises, ready to be delivered to the said parties, or such of them as should require the same, and did thereby then and there award, order, and direct, that the defendants should forthwith purchase or cause to be purchased, in the public funds, in the name of the plaintiff, an annuity of 22*l.* sterling, to be payable to her during her natural life, and which should be in lieu of all provisions and thirds mentioned in that behalf in the said agreement, but in nowise to affect her said claim to her dower; and he did thereby then and there further award, order, and direct, that the defendants should pay and make good to the plaintiff an annuity of the amount aforesaid, from the day of the death of the said *E. Crump*, until the actual purchase of the said annuity in manner aforesaid, and that he had settled and fixed the costs and charges incurred by the plaintiff in or respecting the entering of the said caveat and the proceedings connected therewith, and other matters relative thereto, at the sum of 40*l.* 0*s.* 4*d.*, and did thereby then and there award, order, and direct, that the same sum, and also the costs and charges incurred by the said defendants in or respecting the said caveat, proceedings and other matters, should be respectively paid by the defendants. And he did thereby

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then and there further award, order, and direct, that the costs of that his award, amounting to the sum of 22*l.* 14*s.* should be, in the first instance, paid to him by the plaintiff, and that one moiety thereof should be repaid to her on demand by the defendants, and that the said several parties should bear and pay their own further costs of that reference. And he did, lastly, thereby then and there award, order, and direct, that on the purchase of such annuity and payment of such costs as aforesaid, the plaintiff should, if thereto required, execute unto the defendants, at their own costs and charges, a release of all claims at law and in equity upon or in respect of the personal estate and effects of the said *E. Crump*, of which said award the defendants afterwards, to wit, on &c. at &c. had notice. The declaration then stated in several breaches that the annuity was not purchased according to the award, and was not made good from the day of the death of *E. Crump*; that the costs respecting the entry of a caveat and the moiety of the costs of the reference were not paid as directed by the award. *Indebitatus* count on the award and common counts.

Pleas.—1. General issue. 2. As to the first count of the said declaration, and so much of the second count as relates to the said sum of money therein alleged to be due and owing to the said plaintiff, upon and by virtue of the said award in that count mentioned, *actio non*; because they say, that there were not any facts or circumstances adduced or proved before the said arbitrator, other than the said facts and circumstances in the said agreement in the said declaration mentioned and set forth.

3 (a). That it was proved in evidence before the said

(a) All the special pleas were to the matter recited in the introductory part of the second.

arbitrator that there were not any assets of the said testator whereby or wherewith the said defendants could or were enabled to purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could pay or make good to the said plaintiff an annuity of the amount in the said award mentioned, or of any other amount whatsoever, from the day of the death of the said *E. Crump*, or from any other time.

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4. That at the time of the death of the said *E. Crump* the said defendants had not, nor at any time since have they had, nor have they now any assets of the said testator, whereby or wherewith they could or might, or now can purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could or might, or now can purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could pay or make good to the said plaintiff an annuity of the amount in the said award mentioned, or of any other amount whatsoever, from the day of the death of the said *E. Crump*, or from any other time.

5. That at the said several times of making the said submission and award, the said defendants had not, nor at any time since have they had, nor have they now any assets of the said testator, whereby or wherewith they could or might, or now can purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could pay or make good to the said plaintiff an annuity of the amount in the said award mentioned, or of any other

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amount whatsoever, from the day of the death of the said *E. Crump*, or from any other time.

Replication similiter to general issue. Demurrer to the special pleas, and joinder.


The issue in fact was tried at the last *Shropshire* assizes before *Gurney B.*, who refused to receive evidence offered by the defendants to show that *Crump* left no assets out of which they could purchase the annuity awarded to the plaintiff. Verdict for plaintiff for the value of the annuity as proved. A rule for a new trial having been obtained, on the grounds, 1st. That the testator's verbal instructions to his medical attendant to get a codicil drawn, not being reduced into writing in his presence, or the notes of them, as afterwards taken down by the attorney, having been read over to and assented by him, could not legally receive effect from the arbitrator as a codicil (*a*). 2dly. That the evidence offered of deficiency of assets should have been received, upon which the defendants were not liable to pay the annuity to the amount awarded.

*Whately* and *Talfourd* showed cause in this term. The evidence was rightly rejected, for the award operated as a bar between the parties in all matters referred by them and considered by the arbitrator. Then the fact whether assets existed or not is immaterial, and the annuity being unconditionally awarded without mention of the proviso must be paid. [Lord *Lyndhurst C. B.* Was the arbitrator to inquire into

(*a*) On the validity of instructions for a will, when propounded as a testamentary paper, see per Sir John Nicholl, *Wood v. Wood*, 1 Phil. R. 357; and cases cited in notes to 4 Burn's Eccl. Law, 107, notis, *Tyrowhitt's* edition; *Morgan v. Mather*, 2 Ves. jun. 15; *Ching v. Ching*, 6 ed. 281; *Young v. Walter*, 9 id. 364; *Pedley v. Goddard*, 7 T. R. 73; *Walker v. Walker*, 1 Meriv. 503; *Shepp. Touchs.* 404, 408; *Matthews v. Warner*, 4 Ves. 179.



the question of assets?] As he was to consider the amount of the annuity to be awarded to the plaintiff, he could not inquire into the facts necessary to ascertain it, without discovering any deficiency of assets. The power of the arbitrator under the proviso was discretionary; then, as he has awarded the annuity to be paid, it must at all events be taken that he exercised his discretion on facts before him, whether it was just and reasonable so to award it; for a clause stands before the proviso, which gives full power to award the annuity. Then could the objections raised to the award itself be given in evidence on the general issue?

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*Jervis, Ludlow Serjt. and Godson* were stopped by the court.

LORD LYNTHURST C. B.—The first question for the arbitrator was, whether the bequest of the annuity was or was not valid, and if valid, in what manner it was to be carried into effect. The next question was, whether, after the settlement of all future as well as present claims on the testator, any deficiency of assets would in the result occur? The latter point occasioned the insertion in the agreement of reference of the proviso by which the arbitrator was empowered to provide against the event contemplated. He was not called on to inquire or decide whether or not there were sufficient assets, but he was directed to insert in his award the condition for abatement of the annuity in case a deficiency should arise; and in my interpretation of the agreement of reference it was incumbent on him to have inserted that proviso in his award. Had that been done, evidence of deficiency of assets might have been given at the trial. The question appears to me not to arise on the award itself, as has been argued, but on the submission. Now as the

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submission when prayed in aid shows that a clause resembling the proviso was to be contained in the award, it may either be taken to have been so inserted, or the defendants ought not to be left in a worse situation on account of the arbitrator's omission. According to the construction sought to be put on the wording of the submission, the words "should or might" would be read as terms inconsistent and at variance with each other. But we must, if possible, so construe the instrument that both may have effect; and that consequence will result if we hold them to be imperative, for "shall" would then include "will." That puts an end to that question. As to the point whether the fact of deficiency of assets could be given in evidence on the general issue, it is sufficient to say that this being an action on an award made under a submission without deed, any thing disproving the plaintiff's right to recover might be given in evidence under that plea. Here proof is offered that the annuity was not to be paid if the testator's assets were insufficient for that purpose.

**BAYLEY B.**—The construction urged for the plaintiff would place the legatee in a better condition than creditors. For at the period of making the award it may be impossible to know whether sufficient assets exist or not. A sum sufficient to justify the awarding the annuity to the full amount bequeathed might be in hand at that time, and yet at a distant period bond creditors might prove the testator indebted to them in a much larger sum. Looking at the situation of the parties the plaintiff would only have a right to be paid if funds existed for that purpose, while the defendant's obligation would be to pay so much of them as would be applicable to payment of the plaintiff's claim. Then if the defendants establish that they were only liable

to pay out of the testator's assets, evidence that those assets did not exist might be given under the general issue.

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The other Barons concurred.      Rule absolute.

On a subsequent day *Talfourd* was heard in support of the demurrer.

The special pleas to the first and second counts are not applicable to the award relied on in the latter count, which may be parol only; and therefore being bad in part, are bad in the whole. [*Bayley* B. Is it clear that indebitatus assumpsit will lie on an award not made of and concerning sums due from one person to another?] That form of action lies where debt would. But putting the second count out of the case, these pleas leave unanswered that part of the first which goes for the costs given by the award. Now as the award, if bad in part, was good as to that part which directed the expenses to be paid by the defendants, part of the first count setting forth the award is therefore good; so that the pleas which profess to answer the whole of the first count do not do so.

If a plea pleaded as an answer to the whole of a count leaves unanswered any good part, the plaintiff will have judgment on demurrer.

The *Court* assented on the latter point, but gave leave to amend on payment of costs (a).

(a) See *Pinkney v. Inhabitants of East Hundred of Rutland*; 2 Saund. 379; 1 Saund. 108; 1 Salk. 218.

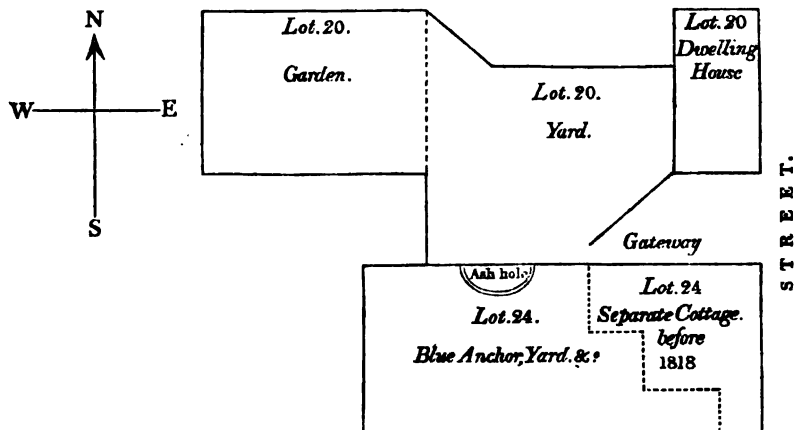
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Where one seized in fee of premises, and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those premises "with all ways, roads, &c. to the same belonging or in anywise appertaining," no way will pass, unless legally appurtenant, or unless it appears from the grant itself that the parties meant to use the word in a sense more extended than the legal one.

*Semble*, Such intention cannot be collected from parol matter dehors the deed.

**TRESPASS** for breaking the plaintiff's close and pulling down a wall. One special plea claimed a way to and from a certain cottage or tenement adjoining the locus in quo over the same into a public highway, under a grant from the Duke of *Devonshire*, when seized in fee of the cottage &c. Another plea claimed a right of way of necessity. Both were traversed by the replications. The locus in quo was a gateway leading from the street of *Wetherby* between two distinct sets of premises in that town, one of which, called the *Blue Anchor*, was claimed by the defendants under a Mrs. *Dawson*. In *October 1824* the Duke of *Devonshire* being seized in fee of the town of *Wetherby*, sold it by auction in lots, of which Mrs. *Dawson*, who was at that time tenant to the duke, of the *Blue Anchor*, its back premises and the cottage or kitchen after mentioned, bought lot 24, being the premises she then held. The plaintiff bought lot 20, consisting of a dwelling-house fronting the street, with yard and garden behind. Between these lots (and excluded from both of them on the plan exhibited at the sale,) was the gateway in question.



A witness deposed that the black lines in the plan denoted the boundaries of the lots.

Previous to 1818 a cottage or room, sold as part of lot 24, abutting on the street to the east, and on the gateway to the north, was occupied by an undertenant to Mrs. *Dawson* as a separate tenement, having a door into the gateway, which was used by the undertenant to go down the gateway into the street, being his only way to go thither. On the north side of the back yard of the *Blue Anchor*, and open to that yard, was an ash-hole, in which before 1818 the occupiers of the cottage, as well as of the *Blue Anchor*, deposited their ashes, the former getting access to it from the gateway. At that time the *Blue Anchor* had no door or window into the gateway. In 1818 the undertenancy having been determined by the duke's order, Mrs. *D.* became occupier of the whole, and having made an internal communication from the *Blue Anchor* to the some time separate cottage, used it as a kitchen. In 1830 the plaintiff built a wall across the gateway. At the trial before *Bolland B.* at the last summer assizes for *Yorkshire*, the above facts appeared, and two deeds were produced, one a conveyance of the *Blue Anchor* from the duke to Mrs. *Dawson* in fee, dated *April 1825*, and containing the words, "together with all ways, roads, rights of road, paths, passages, &c. to the said hereby conveyed premises, or any part thereof, *belonging or in anywise appertaining;*" and the other a conveyance dated *May 1825*, from the duke to the plaintiff in fee, of the messuage, yard, garden, &c. forming lot 20, and also "the road and gateway and the ground and soil thereof at the south end of the messuage, excluding all other persons from every right whatsoever in, to, or over the same road, gateway and ground, and every part thereof." The plans exhibited at the sale were tendered in evidence for the defendants to explain the deeds, and after being objected to as inadmissible, not being part of the deeds, they were admitted. The

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plaintiff had a verdict, the learned baron being of opinion that no right of way of necessity existed, as the defendants' premises abutted on the street; and that no way could be implied to have passed to the defendants by the deed of *April* 1825.

A rule for a new trial having been obtained,

*Coltman* and *Tomlinson* showed cause. The way claimed cannot pass under the words, "belonging or in anywise appertaining." Those words do not pass ways which may have been previously used with the premises, but those only which are strictly appurtenant. Had the words "therewith used and enjoyed" been added, it might have been good as a grant of a new way; *Grymes v. Peacock* (a), *Saundays v. Oliff* (b), *Bradshaw v. Eyre* (c), *Worledg v. Kingswel* (d), *Whalley v. Thompson* (e), *Clements v. Lambert* (f). [*Bayley* B. The words unity of possession are in general incorrectly used for unity of ownership. The former only suspends a prescriptive easement, but cannot destroy it (g)]. In *Harding v. Wilson* (h), *Holroyd* J. said, "The underlease describes the ground demised and the ways granted by the words 'always thereunto appertaining'." The road in question being over the soil of the original lessor, would not pass by those words. Leases usually contain the words 'heretofore used,' by which such a way would pass. [Lord *Lyndhurst* C. B. The particular legal sense of the word "appurtenant" must be given to it, unless the intention of the parties to the contrary appears. That seems to have been the result of *Morris v. Edgington* (i). To meet that, modern

(a) 1 Bulstr. 17.

(b) *Moor*, 467.

(c) *Cro. El.* 570.

(d) *Id.* 794; 2 *Anderson*, 168. S. C.

(e) 1 *Bos. & P.* 371.

(f) 1 *Taunt.* 205.

(g) See S. P. by *Bayley* B. *Canham v. Fisk*, 2 *Tyrw.* 156; and see note there.

(h) 2 *B. & Cr.* 100.

(i) 3 *Taunt.* 24.

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conveyances usually supply the words "thereunto used and enjoyed."] So here, had the grant been made in 1818, when the undertenant of the cottage used the way, it could not have passed as a right of way of necessity, because the owner of the fee could not have had such a right over his own land (a). [*Bayley B. Clements v. Lambert* is an instance to show that in many cases effect cannot be given to every general word in a deed, for what right of common existed there, on which the word appertaining could attach? *Kooystra v. Lucas* (b) judicially established the distinction; there the claim to the way was established under the words "used and enjoyed" with the premises. In *Morris v. Edgington*, which will be cited on the other side, it appeared that one of two ways must have passed as a way of necessity, the question was, which? In the result, that most convenient to the grantee was held to have passed. It will be hazardous to depart from the ordinary construction of deeds, in order to attempt to satisfy every general expression inserted in them for the sake of embracing every possible right, whether existing or not.

*F. Pollock* and *Hoggins* in support of the rule. It was manifestly intended at the time the defendants bought lot 24, that they should have this way, for in the plan it was excluded from the boundary lines of either lot, as not intended to be then sold. The subsequently adding it to the plaintiff's lot 20 was a fraud on the defendant. *Morris v. Edgington* was the case of a way demised, not of a way of necessity, and much resembles this case. *Mansfield* C. J. there says, that deeds must be construed secundum subjectam ma-

(a) See last note, and per *Mansfield* C. J. 3 Taunt. 30.

(b) 5 B. & Ald. 830.

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teriam, and most strongly against the maker. Here the only subsisting way being that in question, that only could have been intended to pass, though described incorrectly as appurtenant. The conveyance of lot 24, by referring to the particulars of sale, of which the plan was part, thus, "as the same is now staked and marked as lot 24, in the particulars of sale," makes those particulars part of the deed. So a declaration referred to by a policy as to be indorsed thereon, is, when so indorsed, received in evidence as if part of the original policy. Why may not the right of way pass without the words "heretofore used therewith?" "Belonging" is not so technical a word as "appertaining," and can hardly bear a different meaning than "therewith used." *Morris v. Edgington* shows that the court is not compelled to construe the word "appertaining" in its legal sense, where a contrary and more extended sense has been contemplated by the parties: and in this case the plan and circumstances of the sale show that it was used in the broader sense. There was a way of necessity to the ash-hole. [*Bayley* B. Defendants might make a way to it by breaking through his wall.]

Lord LYNTHURST C. B.—The question in this case is, what is the meaning of the words "belonging and appertaining," in a deed conveying to the defendants a certain messuage with "all ways, roads, rights of road, paths and passages, to the said hereby demised premises belonging or in anywise appertaining." It seems to me that the terms "belonging" and "appertaining" are as here used synonymous. It is also quite clear that the way now in dispute was not a way in the ordinary legal sense of the word, appurtenant to the messuage granted. The authority of the cases cited is amply sufficient to establish this rule, that if a man



possessing a right of way over a close, afterwards becomes the owner of it, a conveyance of it by him "with all ways belonging and appertaining," will not pass that right of way unless it be a way of necessity, which would pass without any such words. A right of common is similarly circumstanced. If a man having a right of common over land, afterwards buys the land itself, so that there is a unity of ownership and of right, the right of common is extinguished, for the owner of both has an independent right as owner of the fee, and if he grants over that land to which the right of common has been attached, only using in his grant the words with all rights thereto "belonging and appertaining," the right of common will not pass, for those words are not sufficient to revive it or create it *de novo*. In *Clements v. Lambert* the apt expressions sufficient to pass such rights of way in the ordinary cases of conveying premises or land, are clearly shown to be "all ways belonging or appertaining or therewith used or enjoyed." Under those terms, a right of way used by you in land while you were the owner of it will pass. A distinction was set up between belonging to and "appertaining," of which I had never before heard; had it existed, the court would not have passed it over in the case in *Bulstrode*, where both those words were used. When the word "appertaining" immediately precedes or follows "belonging," I consider them synonymous. From *Morris v. Edgington* it is clear that where, as in that case, it may be collected from the deed itself that the parties neither did nor could intend to use the word "appertaining" in its strictly legal sense, the court will give to it that extended construction which it was meant to bear. That case is not inconsistent with the present, in which no evidence appears that the word was meant to be used in any but its common legal acceptance. It is

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next said that in this case you are at liberty to refer to the plan exhibited at the sale, for the purpose of giving the deed a different interpretation. I give no absolute opinion, for it is not necessary to decide the point of admissibility; but the present impression of my mind is, that you are not at liberty to add to or diminish any thing by parol matter dehors the deed. It is enough for me to say, that taking the plan and the deed together, it does not appear to have been the intention of the seller of the property in question to part with the right of way to the defendants. Had he meant to convey to them this right, which it was not essential or necessary to their occupation to possess, care should have been taken to use words sufficient to pass it. Then as I see no satisfactory evidence that the parties intended to give to the words "belonging and appertaining" an interpretation larger than their legal sense, I am bound by the authorities to give them their acknowledged acceptance. The defendants have not made out their justification, and the rule must be discharged.

BAYLEY B.—I am of the same opinion. The construction of deeds must be ruled by the language of them. It has been repeatedly decided, that where a previously existing easement has been extinguished by unity of ownership, it ceases; and if the owner parts with the premises to which it formerly attached, it will not pass to the grantee without the use of such words as will show the grantor's intention to create it de novo. By the grant of a close "with all ways thereto belonging and appertaining," the easement of a way will not pass, except it be a way of necessity, for which no words of grant are requisite. The case of the common in *Bulstrode* is similar, where the right of common being extinguished by unity of ownership, viz. by the

soil of the waste and the premises in respect of which it had existed being united in one person, the grant by him of those premises, with all commons appurtenant thereto, was held not to pass the right of common. Had the grantor in that or the present case used the words "or therewith used or enjoyed," the rights claimed would have passed. My impression is against the admissibility of the plan in evidence, and for the reason already stated; but I give no opinion, as, even if I could refer to it, I could gather from it no proof of intention to use the words in question in any but their ordinary legal sense. There is no evidence that the duke ever intended to continue a right of way through this gateway, for as the defendant's premises have a frontage on the street there would be no necessity for it, except for the plaintiff's access to his own premises. The way was not essential to the enjoyment of the defendant's premises, and therefore could not pass to him without apt words. We have been pressed with the authority of *Morris v. Edgington*, but the clear distinction between that case and the present is, that that being a way of necessity no particular words were requisite to pass it; for, in absence of all such words, the way would pass on the principle that when land is granted to a man the means of access to it pass by the same grant. In that case it was not requisite to ascertain the sense of the word "appertaining," for there was no other mode of getting at the tap-room but by one of the ways claimed; and all that the court decided was, that there being two ways, each of necessity, the party was entitled to that which was most convenient to the party requiring it. That case does not interfere with the current of authorities or the general rules applicable to cases of this kind; I am therefore of opinion that we must con-

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strue this deed in the ordinary manner, and consequently that the way claimed did not pass.

BOLLAND B.—I remain of the same opinion which I entertained at the trial. We are to look at this deed only, and to say whether there is any thing in it to warrant us in giving any other than the legal meaning to the expression “appertaining.” In *Morris v. Edgington* the deed showed a clear intention that the word should receive a larger construction, but there is nothing of that kind in this case. I agree that even if we could take the plan into consideration it would not benefit the defendants. For though the gateway in question had been left an open space when both lots were sold, as described in the plans, the evidence was, that it had been afterwards added to and made part of lot 20.

GURNEY B.—Nothing in the case shows any intention of the parties to use the word “appurtenant” in any other than its ordinary legal sense.

Rule discharged.

See *Doidge v. Carpenter and Others*, 6 M. & S. 47.

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GLEADOW and Others, Executors of GLEADOW, against  
ATKIN and Another, Executors of ATKIN.

**D**EBT on bond, dated 17 *Sept.* 1805, executed by the deceased *Atkin* for payment to the deceased *Gleadow* of 250*l.* with lawful interest. Oyer of the bond. Pleas, 1. Non est factum; 2. Solvit ad diem; 3. Solvit post diem: and issues thereon. The 4th plea was that demurred to, vol. ii. 593.

On 14th *Aug.* 1800 *Cuthbert Thew* died, having by his will appointed *Gleadow* and *Atkin* (the respective testators and obligor and obligee of the bond) his joint executors. He bequeathed his personalty to them, and the survivor of them, in trust to sell and dispose of the same, and place out the proceeds in such real or other sufficient security as they should approve of, and then to pay the interest thereof to his wife *Margaret Thew*, (living at the time of the trial,) for her life, and after her death to pay certain legacies. By the will each of the trustees was only to be answerable for his own acts. The will was proved 6th *Nov.* 1800, and the executors received 250*l.* under it. *Atkin* obtained that money for his own use on giving *Gleadow* the bond (now in suit) for the amount, dated 17th *Sept.* 1805. *Gleadow* died in 1826, and *Atkin* in 1827.

At the trial at the *York* summer assizes 1832, before *J. Parke J.* the execution of the bond was proved by

In an action in 1832 on a bond dated *Sept.* 1805, the plaintiffs, in order to rebut the presumption of its payment, proved that a sum equal in amount to the interest which would be due on it, had been paid by the obligor to *M. T.* in 1826 or 1827, after demand made on her behalf of interest due on a bond. Next, in order to apply that payment to the bond, they offered in evidence an indorsement thereon signed by the obligee, and stating that the principal money secured was not his money, but trust mon-

ney under a will, which was to be placed out by himself and the obligor. The indorsement purported to bear date on the same day with the bond, and was attested by one of the witnesses to it, but was not proved to have been seen by or known to the obligor. Nothing appeared to show that it was not signed on the day it bore date, or at a period nearly contemporaneous:—Held, that the indorsement was admissible in evidence for the representatives of the deceased obligee, it having been made by him against his interest at the time, and he having peculiar means of knowledge of the fact, without any motive to misrepresent it.

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*William Pybus*, who was an attesting witness to it with one *William Jackson*, at whose office *Pybus* said he thought the bond was executed; and in order to rebut the presumption of payment arising from the age of the bond, a witness proved that in *Dec.* 1826 he had applied to the deceased *Atkin* on behalf of *Margaret Thew*, for payment of interest due to her on a bond, and was present when a payment was made about that time by him to her of such a sum as would be due for interest on it. To prove that payment to have been made on account of the bond in question, the following matter indorsed on it was offered in evidence:—

“ I, the within-named *Robert Gleadow*, do hereby acknowledge that the within-mentioned principal sum of 250*l.* is not my own proper money, but trust money under the will of the late *Cuthbert Thew*, to be placed out by myself and the within-named *John Atkin*. As witness my hand, 17th *September* 1805.

“ *Robert Gleadow.*

“ Witness, *William Pybus.*”

*Pybus* was recalled, and proved his signature to the indorsement as attesting witness, saying he should not have put his name to it had he not seen it signed by *Gleadow*, but whether it was signed on the same day as the bond, or where, he could not recollect. It did not appear distinctly that the obligor (*Atkin*) had ever seen the indorsement. The dates of the bond and indorsement were the same. Both were written by *Jackson*, the other attesting witness to the bond. The bond and indorsement appeared to be in different inks. The proposed evidence having been objected to, the plaintiffs had a verdict for principal and interest, with leave

to move to enter a nonsuit. A rule was obtained accordingly by *F. Pollock*, against which

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*R. Alexander* showed cause. The indorsement on the bond was admissible in evidence,—1st, As an act cotemporaneous with the execution of the bond, and forming part of the original transaction: 2dly, As a declaration against the interest of the party who made it, having peculiar means of knowledge of the subject-matter.

On the first point the rule is thus stated in *Phillipps on Evidence* (a):—"Hearsay is often admitted in evidence, as constituting a part of the transaction which becomes the subject of inquiry; the meaning of which seems to be, that where it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, for the purpose of showing its true character." Thus, declarations of a trader at the time of absenting himself from home, or immediately after, are evidence to prove the motive of his absence; letters written by the payee or indorsee of a note to the maker cotemporaneously with the making it, and forming part of the original transaction, are evidence to prove a consideration between the parties; *Kent v. Lowen* (b). In *Thompson et ux. v. Trevanion* (c), Lord Holt suffered what the wife said at the time of the defendant's assault on her to be given in evidence for the plaintiffs. So what a party assaulted has said to his surgeon is evidence to show his sufferings (d). In *Aveson v. Lord Kinnaird* (e) the state of health of a party deceased, on the day she obtained a certificate of health, being the

(a) 6th edit. 270. (b) 1 Camp. 179, 180 n. (c) Skinner, 402.

(d) Per Lawrence J. 6 East, 198.

(e) 6 East, 194.

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matter in question, a declaration made by her, some days after having got it, as to her state of health before that time, was held admissible in evidence. Those cases show, that if this indorsement was an act contemporaneous with the execution of the bond, it is admissible in evidence. Then, was it contemporaneous? The dates of both instruments are the same, and the presumption is, that all was rightly done. *Gleadow* had no interest in adding the indorsement at any time subsequent to its date. The difference of inks does not prove that it was written at a different time. As the bond was not to be executed by the obligee *Gleadow*, he might have been absent then, but if the indorsement was written at his house on the same day by agreement with *Atkin*, that would be a contemporaneous act. Again, if it was written on the bond before its execution it would be part of its condition, and evidence as a cotemporary act, explanatory of the parties intention respecting its operation. See per *Popham J.* in *Broke v. Smith (a)*, relied on by the court in *Burgh v. Preston (b)*.

On the second point, *Gleadow's* declaration is admissible in evidence as a declaration against his own interest. The rule in *Phillipps (c)* applies:—"The declarations or statements of deceased persons have been admitted in many cases where they appear to be made against their interest; as entries in their books charging themselves with the receipt of money on account of a third person, or acknowledging the payment of money due to themselves. In either case the entry is to their own immediate prejudice." Sir *T. Plumer* says, in *Short v. Lee (d)*, the principle is, that the entry

(a) *Moor*, 679.(b) 8 T. R. 483, 486; and see *Steadman v Purchase*, 6 id. 737.

(c) 6th edit. 243.

(d) 2 Jac. &amp; W. 475.



is made by an individual conusant of the fact at a time when it was not in dispute, having no interest to make a false entry, and making one tending to charge himself. In *Ivatt v. Finch* (a), the question being whether certain horses seized under heriot custom belonged to the plaintiff or *A.*, a deceased tenant of the defendant, the declaration of *A.* that she had given up her stock to the plaintiff, being against her interest had she survived, were held to be evidence for the defendant to prove the property to be in the plaintiff. Again, this indorsement, adverse to the interest of *Gleadow* who made it, yet remained in his possession. In *Roe d. Brune v. Rawlings* (b) a paper preserved among the muniments of the person against whose interest it operated, was admitted in evidence; Lord *Ellenborough* saying (p. 289), "The contents of the paper (a rental) were adverse to the title of the person who had possession of it (*viz.* a tenant for life); it diminished his interest in the fine on renewal, in the same proportion as it raised the rent to be reserved." And afterwards (p. 290), "Then at this distance of time, with the means of knowledge he had of the fact and his interest in declaring it the other way, we think that his declaration (by indorsement on the rental) is evidence of the fact to go to the jury." So the date this indorsement bears is at least *prima facie* evidence of the time when it was made. *Searle v. Lord Barrington* (c) was an action on a bond by the administratrix of the obligee against the administrator of the obligor. The defendant relied on the presumption of payment arising from the date of the bond, being twenty-seven years before the action brought. The plaintiff then

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(a) 1 Taunt. 141.

(b) 7 East, 279.

(c) Stra. 826, S. C. 8 Mod. 279; 2 Ld. Ray. 1370; 3 Brown's P. C. 593; best compiled from the various reporters, in 2 Phill. Evid. 6th edit. 138.

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offered in evidence two indorsements of the obligee on the bond, one dated two years, the other nine years after the date of the bond, purporting that the whole interest had been paid up to the respective dates of those indorsements. *Pratt C. J.* at the first trial in 1724, rejected the evidence, on account of the opportunity afforded to the obligee, having possession of the bond, to make such indorsements on it at any time. But it was afterwards held in *K. B.* and finally in *Dom. Proc.* that the indorsements should have been left to the jury, who might have reason to think they were made with the privity of the obligor, and for his greater security against the loss of other evidences of payment, *viz.* receipts, &c. That was so held, though (as was argued in *Dom. Proc.*) there was no other direct evidence when the indorsements were made, or that they were made within twenty years after the date of the bond (*a*). *Bosworth v. Colchett* (*b*) established, that when indorsements were made on a note by the payee of the half-yearly payment of interest thereon, down to his death, within six years from its date, similar indorsements by his executor, for more than six years after, were evidence after the executor's death to answer a plea of the statute of limitations. In *Sanders v. Meredith* (*c*) the date of the indorsement, purporting to be made by the obligee on a day within 20 years, and acknowledging the receipt of interest on the bond due at a previous day, was relied on by the court to prove it a valid bond within 20 years. [*Bayley B.* asked if the indorsement was there attested.] It was not; but a witness proved the fact of payment of interest. In

(a) See now 9 *G. 4.* c. 14. s. 3. as to writings not specialties.

(b) 2 *Phill. Ev.* 143, *Dom. Proc.* 1826.

(c) 3 *M. & R.* 116.

*Chambers v. Bernasconi* (a) the declaration was rejected as not being against the interest of the party making it. A paper, signed by a sheriff's officer and returned by him to the sheriff's office, was sought to be given in evidence not only to prove the fact of arrest, but also the place where it happened. But Lord *Lyndhurst* C. B. said that none of the cases cited on the subject authorized so great an extension of the principle there contended for; and *Bayley* B. asking how the entry could be said to militate against the interest of the officer, doubted very much whether, if admissible at all, it could be evidence to prove the additional circumstance of the place where the arrest occurred. He also declared that the principle on which the statements had been admitted in *Higham v. Ridgway* (b), *Doe v. Robson* (c), and *Middleton v. Melton* (d), was, that at the time of making them they were against the interest of the parties who made them. Here the indorsement made by the obligee was clearly against his interest. [*Bayley* B. It was an indorsement which, if true, it was his moral duty to make, in order that after his death, or if he became bankrupt, something should exist to show that money to be *Thew's* and not his.] That adds strength to it. The distinction is between indorsements made before those 20 years elapsed, and before any temptation to the obligee to make them could exist, and indorsements made after that period and after that temptation may have operated. *Searle v. Lord Barrington* was followed in about ten years by *Turner v. Crisp* (e). In that case an indorsement by the obligee, stating that part of the principal had been paid, was rejected, it having been made after the presumption of payment had accrued by the lapse

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(b) 10 East, 109.

(c) 15 East, 33.

(d) 10 B. &amp; Cr. 317.

(e) *Stra.* 827.

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of 20 years. For it had then become the interest of the obligee to make the indorsement, whereas such a declaration was against his interest if made before that time had elapsed. That distinction is pointed out in *Glyn v. Bank of England* (a), which also recognizes *Searle v. Lord Barrington*. Lord Hardwicke saying, "In that case I take it the indorsements were made and bore date within the 20 years, for if they were made after the expiration of 20 years, though they were evidence of the actual payment of interest after that time, they would not be evidence to take it out of the presumption. Again, in *Rose v. Bryant* (b), Lord Ellenborough held that indorsements on a bond stating the receipt of interest and payment of part of the principal, but not written by the obligor, did not prove against him that the bond was unsatisfied at the time they bore date, unless it was shown by other evidence that they were on the bond at or recently after that time, and at a time when their effect was clearly in contradiction to the obligee's interest. [*Bayley* B. This indorsement must be at all times against the interest of the obligee.]

*F. Pollock* and *Cresswell* in support of the rule. The question at issue is of no less importance than this: Under what circumstances can a declaration made by a party orally or in writing, be evidence on his own behalf? The cases cited are referable to distinct classes, and though from some of them principles may be deduced appearing in some degree to resemble this case, it substantially differs from them all.

It was first argued that the indorsement must be presumed to be cotemporaneous with the execution of

(a) 2 Ves. sen. 38, 41, 43.

(b) 2 Camp. 321.

the bond, on the principle of *omnia præsumuntur rite esse acta*, and was therefore evidence as part of the *res gestæ*; and afterwards that it being *Gleadow's* duty to make the indorsement, he must be taken to have done that duty properly. [*Bayley B.* That was not put as a direct ground, but as a circumstance in the case not to be wholly left out of sight.] Then it cannot form an ingredient in the judgment on the admissibility of this indorsement in evidence. And it is only in support of presumptions of innocence, as *e. g.* that a public officer has not neglected his duty; *Williams v. East India Company* (a); that a clergyman inducted to a benefice has not omitted to read the 39 articles, and the like, that any inference from the fact of its being a man's duty to do a certain act, has been allowed to be made that he has not omitted it. But here it was not so much the duty of *Gleadow* to make this indorsement, as will raise the presumption that he did so without further evidence of that fact. So it would be his duty as trustee to keep accounts of the state of the trust, but it would not be presumed that he did, or if he did, that they were correct; nor would they be evidence against the obligor. This obligor was also a trustee, and it was as much his duty as the obligee's to keep a similar account. Suppose the obligor to have entered in his book that he had borrowed 250*l.* of this obligee, and had given him a bond for it, that entry, though made according to his duty and against his interest, because acknowledging himself to have incurred the debt, would not be evidence against his co-trustee. Whether or not there was a moral obligation on him to make this indorsement, there was no duty to do so for breach of which he could be responsible; so that the rule does not apply. Nor is

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(a) 3 East, 192. See *Rex v. Inhabitants of Long Buckby*, 7 East, 45.

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this indorsement shown to be cotemporaneous with the execution of the bond. It is a declaration by the obligee, not by the party executing the bond; whereas in most of the cases it has been a declaration by a party at the time of doing the act. *Kent v. Lowen* (a) differed much from this case, being by the indorsee against the maker of a note; letters from the payee were tendered in evidence by defendant to prove the defence of usury. Lord *Ellenborough* held them to be equally admissible with an oral declaration, *i. e.* against the writer, who was identified in interest with the plaintiff. In *Aveson v. Kinnaird* (b), the leading case on the question of cotemporaneous declarations, the declaration of the wife that she was ill, was admitted against the husband of necessity; 1st, to contradict a surgeon; 2d, that as her internal feelings could only be known to him from her answers to his questions, her subsequent declaration was evidence of equal weight. *Thompson et. ur. v. Trevanion*, as to the battery of a wife, turns on the same ground of necessity. But here had *Gleadow*, who made the entry, lived and sued, he could not have been examined to a fact though against his own interest, nor could this indorsement be a part of the *res gestæ* by *Gleadow* as against *Atkin*; for, for all that appears, it was made by *Gleadow* without *Atkin*'s knowledge; whereas, had *Atkin* made it, it must have been known to *Gleadow*, and *Atkin* would have recognized his own execution of the bond. If this indorsement would affect *Atkin* as part of the *res gestæ*, then had a similar entry been made by *Atkin* in his own book, it would be evidence against *Gleadow* on the same ground.

It was then said that the indorsement was evidence as a declaration against the interest of the party making

(a) 1 Camp. 176.

(b) 5 East, 193.

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it. But if so, it would be so admissible as an exception to the rule against hearsay evidence, and not to the rule that a party shall not use evidence made by himself. That rule remains in operation, as appears clearly from the leading case of *Higham v. Ridgway* (a), where *Bayley J.* says, "If a party who has knowledge of the fact makes an entry of it, whereby he charges himself or discharges another, upon whom he would otherwise have a claim, such entry is admissible evidence of the fact after the party's death, if he could have been examined as to the fact in his life-time." [*Bayley B.* In that case the question was, whether a person was of age; and the entry was admitted in evidence, on the ground that the man-midwife had peculiar means of knowing the time of the birth, had no interest to misrepresent, and had crossed out the entry of his charge against his own interest at the time.] That class of cases of which the above, with *Ioatt v. Finch*, and *Warren v. Grenville* (b) form part, turn on the point whether the deceased party could have been examined in his life-time. The man-midwife in *Higham v. Ridgway* could, but *Gleadow*, this indorser, could not. Why should this written declaration by him be admitted in evidence if *Gleadow's* own evidence on oath would not have been admitted had he lived, and if oral evidence of what he had been heard to say to the same effect would not? For it does not appear that *Atkin* ever saw the indorsement. The only exception to the rule against admitting entries made by parties standing in the same situation, is that of a rector or vicar; but that is expressly on the ground that they never could be evidence in his own favour (c).

(a) 10 East, 122.

(b) Str. 1129.

(c) 1 Phill. Ev. 6 ed. 247.

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The last class of cases cited was that in which entries of receipts of money indorsed on bonds and other securities by the obligees, have been admitted on behalf of those who made them. But nothing favours their application to other cases not exactly corresponding in facts. That sort of evidence is repudiated by the legislature, with respect to securities not being specialties (a).

In those cases the indorsements admitted in evidence were not only against the plaintiff's interest but in favour of the defendant. *Outram v. Morewood* (b) shows that *Searle v. Barrington* has not been invariably followed. [Bayley B. I have ascertained the fact, that in *Searle v. Barrington* extrinsic evidence was given that the indorsements there in question were made within 20 years from the date of the bond; I am not aware that this fact, which was found by the jury, and is the foundation of that case, is in any of the reports, and its absence may have discredited the case. Vaughan B. The report of *Searle v. Barrington*, in *Brown's Parliamentary Cases*, stating that "other circumstantial evidence was given to induce the jury to believe the bond was not satisfied," is now confirmed.]

In that and other cases it is to be taken that the entry was made at the time of payment, and was known to the party paying. In *Sanders v. Meredith, Parke J.* founds his judgment on the indorsement being made in the presence of the party paying. No case is cited that the verbal declaration of the party receiving the money would be evidence to rebut the presumption of payment. Then it can only acquire weight by being on the bond either as inter partes, or as in favour of the defendant as well as against the plaintiff's interest.

(a) 9 G. 4. c. 14. s. 3.

(b) 5 T. R. 121.



But is this against the plaintiff's interest? He is at all events responsible for the trust money received, and the bond is already held to be a bad security (a). Nothing in it exonerates him. [*Bayley B.* Suppose *Gleadow* had died insolvent and his creditors had claimed this sum as assets, could it have been recovered on this bond? Are you aware of *Middleton v. Melton* (b), that an entry by a man in his private book against his interest is evidence against all the world?] That case is one of those excepted from the rule against hearsay evidence, but not excepted from the rule against a man using for his own benefit evidence made by himself.

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*Cur. adv. vult.*

The judgment of the court was afterwards delivered by *BAYLEY B.*—This was an action on a bond brought by the executors of *Gleadow* against the executors of *Atkin*, and the question was, whether a particular indorsement or memorandum on that bond was admissible in evidence. This indorsement was a declaration on the part of the obligee that the money which formed the consideration of that bond was trust money, to be dealt with by *Gleadow* and *Atkin* as executors under the will of one *Cuthbert Thew*. There could be no doubt upon the testimony of the witnesses that the indorsement was put upon the bond at the same time, or very shortly after the making of the bond. The indorsement was in the same hand-writing as the bond; in both, the same blanks were left for the date and filled up in the same hand-writing. The attesting witness, *Pybus*, said that he would not have put his hand to the memorandum if he had not seen it signed on the day it bore date. The presiding judge

(a) *Ante*, Vol. ii. 593.

(b) 10 B. & Cr. 317.

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thought that it was signed long before the period when payment could be demanded. The question was not on the effect of the indorsement, but whether under these circumstances it could be received in evidence. I take the rule to be, that the declaration of a person who having peculiar means of knowing a particular fact, makes them against his own interest, are, after his death, admissible in evidence. That rule has been supposed to be varied by the case of *Higham v. Ridgway* (a), in which a supposed expression of mine is supposed to have qualified it. I am reported to have said, that the principle running through all the cases from *Warren v. Grenville* to *Roe v. Rawlings* (b) is, "that if a person has peculiar means of knowing a fact, and makes a declaration of that fact which is against his interest, it is clearly evidence of that fact *if he could have been examined to it in his life-time.*" That qualification is not to be found in any of the other books or cases in which the rule is laid down. The rule has always been generally laid down, and I must say that I doubt whether that expression ever was used by me; but if it was, and if it bears the meaning ascribed to it by Mr. *Cresswell*, then *Barrington v. Searle* (c), and other cases in the House of Lords, are directly against such a qualification. The rules laid down in Mr. *Starkie's* and Mr. *Phillipps's* works are against it. My own opinion, in *Doe v. Robson* (d), was expressed without any such qualification; and again in *Middleton v. Melton* (e), in common with my brothers *Littledale* and *J. Parke*. My reason for doubting whether I ever used the expression attributed to me is this, that having at that time abstracted *Roe v. Rawlings*, and in all probability having that case before me at the time of delivering my opinion

(a) 10 East, 109.

(b) 7 East, 279.

(c) 3 Bro. P. C. 593.

(d) 15 East, 38.

(e) 10 B. &amp; C. 317.

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in *Higham v. Ridgway*, I was not likely to have added a qualification not borne out by that case. My entry of *Roe v. Rawlings* in my own book was, that "the declaration of a person who has peculiar means of knowing a fact, and has no interest in mis-stating it, is admissible in evidence to prove such fact after his death; especially if the fact is against his interest." When I afterwards gave my opinion in the case of *Higham v. Ridgway*, I adopted the rule as above stated (a). My abstract of that case was—"An entry made by a man who is dead will be evidence as to strangers of a fact peculiarly within his own knowledge, if he had no interest in misrepresenting it, or if the entry either charges him with the receipt of money for a third person, or imports that a debt which would otherwise be due to him is paid." There is not one single syllable in that abstract as to his capability of being examined to it in his life-time. If it be meant to be argued that *Gleadow's* declarations would not be evidence for him in a suit instituted by his representatives, then *Barrington v. Searle* and *Bosworth v. Cotchett* are decisions in the House of Lords to the contrary. When *Searle v. Barrington* was mentioned here, I had an impression on my mind that the obligee in the bond had died within 20 years; but on looking into that case, as reported in *Brown's Parliamentary Cases*, it appears that the obligor so died. The only objection I ever heard expressed to that case was, that it was supposed there was no evidence but the date of the indorsement itself to show that the indorsement was made within the 20 years, and that may have occasioned the difference of opinion upon it (b). In 2 *Vesey*, 43, Lord *Hardwicke* approves

(a) And see the observations of Sir *Thomas Plumer*, M. R. in *Short v. Law*, 2 Jac. & W. 488, 489.

(b) *Comyns B.* differed from the other judges in *Dom. Proc.* 3 *Brown's P. C.* 593, n.

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its authority, assuming that the indorsement was made and bore date within 20 years. Then it is an express authority that the indorsement is evidence for the party making it or his representatives, the indorsement being against his interest at the time of making it. *Bosworth v. Cotchett*, which was the case of an indorsement on a note, is in point. (He stated it.) There was extrinsic evidence in that case of the time at which the indorsements were written; and it shows that the words "if he could be examined in his life-time," are not to be taken as part of the rule of law. For these reasons I am of opinion that the correct rule of evidence is what I have already stated, namely, that a declaration of a man possessing peculiar means of knowing the fact and having no interest to misrepresent it, made against his own interest, and before the time when the presumption of payment could attach, is admissible in evidence. It is on this principle that *Warren v. Grenville* and all the cases were decided, in which bailiffs and receivers accounts have been held admissible in evidence, as charging the party making the entries.

VAUGHAN B.—After the able and elaborate judgment of my brother *Bayley*, I should have forborne to express my opinion at length had it not been desirable that we should state the principle of our decision. Nor is that a difficult task. The earliest case on the subject is that of *Searle v. Barrington*, which is the source from which all the subsequent authorities have flowed in an uninterrupted channel. These cases lay down in effect this principle, that where a declaration is made against the interest of the person making it, he having peculiar knowledge of the fact at the time to which that declaration applies, and having no

motive to misrepresent it, that declaration shall be received in evidence, not only against the party making it, but against all the world. That is a plain ground to proceed on. The case would be much stronger where it appears that the declaration was cotemporaneous with the act, (as with the execution of the bond in the present instance,) and that it was made with the privity of the obligor; but I forbear to rest my judgment on that particular circumstance, which, with the effect of inspecting the bond, was a question for the jury. The present question is, whether the judge should have permitted this indorsement to be read to them. It was for them to say whether the transaction was honest, or the reverse. It is said, that *Searle v. Barrington* has been always dissented from, but no judgment of any particular judges who expressed their dissent is referred to. Chief Justice *Pratt* did so once, but he was the judge who at the trial at nisi prius nonsuited the plaintiff; and the other judges differed from him; though, owing to the then rule about a nonsuit, they left the party to bring a fresh action. He did so: and it was then tried before Lord *Raymond* C. J. who received the evidence. A bill of exceptions was tendered. The question then came before the court of error, and was argued before eight judges, two of whom (including *Comyns*) differed from the rest. When it afterwards came before the House of Lords, we collect from *Brown's* report that there was again a difference of opinion, as the judges gave their opinions separately. It is not unimportant to see how the case was dealt with in an instance occurring in 2 *Geo. 2.* recently after the decision in the House of Lords. That was the case of *Turner v. Crisp*, in 14 *Geo. 2 (a)*. There the chief justice had refused to admit an indorsement of the receipt of part payment of a bond, made after the pre-

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(a) *Str.* 827.

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sumption of payment had arisen, because that state of things was said to be different from that of *Searle v. Barrington*, where the indorsement appeared to have been made before it could be thought necessary to be made use of to encounter the presumption. That confirms *Searle v. Barrington*, as does Lord Hardwicke in *Glyn v. The Bank of England*. It is difficult to understand how the obligee of this bond could have any motive to insert an indorsement of an earlier date than the true one, for its effect was de hors the statute of limitations; and to presume that he would commit a fraud in inserting a false date, is contrary to the object of the indorsement itself. *Searle v. Barrington* has not been trenchd on by any one of the subsequent cases. It was expressly acted on in *Barnes v. Ransom* (a), in 4 Geo. 2. *Outram v. Morewood* is a strong authority on this subject, the question being, whether entries made by a third person of the receipt of rent proved the identity of the land. Mr. Justice Buller said, that evidence not upon oath is not admissible, except in cases of pedigrees and certain other excepted cases, or where the declaration was against the interest of the party making it. Then came *Higham v. Ridgway*, in which my brother Bayley is supposed to have introduced as a qualification, "if the party could have been examined in his life-time." Probably this is misreported, but at most it is only a circumstance, and is unnoticed by the other judges. In *Doe v. Robson* (b) the question again came before the court, and Lord Ellenborough put the case on the point that there was a total absence of interest in the party's making the entries to pervert the fact, and at the same time a competency in them to know it. My brother Bayley, if he thought the rule ought to be qualified, as he was represented in the former case to have thought, would

(a) Barnardiston, 432.

(b) 15 East, 32.

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have interposed his opinion to that effect, but he did not: on the contrary, he stated generally that "if a party who has knowledge of the fact makes an entry of it, whereby he charges himself or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest." *Higham v. Ridgway* afterwards came under the consideration of the Master of the Rolls, in *Short v. Lee* (a). Sir Thomas Plomer commented on the supposed qualification, and after adverting to Mr. Justice Bayley's subsequent judgment in *Doe v. Robson*, which states the rule without the qualification, said, "These documents possess those qualifications which have been always held to make the declarations of deceased persons evidence, namely, that they were made by persons having a competent knowledge of the matter, or whose duty it was to know; who had no motive to make a false representation, and their written declarations being directly at variance with their own interests. Such declarations are universally evidence;" and *Doe v. Rawlings* (b) is there referred to. There is no foundation for saying that the qualification ascribed to my brother Bayley by the report of *Higham v. Ridgway* was ever intended to be insisted on as a necessary ingredient in the rule, though he might have mentioned in his judgment the additional circumstance that, had he lived, the party might have been examined. In *Middleton v. Melton* these cases were again brought under the consideration of the court. My brother Bayley never adverted to that as an ingredient in or necessary qualification of the rule. Mr. Justice Littledale says, "*Warren v. Grenville*, *Barry v. Bebbington* (c), and *Higham v. Ridgway* (d), establish this general principle, that

(a) 2 Jac. &amp; Walk. 467.

(b) 7 East, 279.

(c) 4 T. R. 514.

(d) Stra. 1129.

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where a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact which is against his interest at the time, it is evidence of the fact as between third persons after his death." Mr. Justice *Parke* says, "The question is, whether entries in a private book acknowledging that he had received certain sums of money, are, after the death of the party who made them, admissible evidence against third persons to prove the fact of the receipt of the money. The general rule undoubtedly is, that facts must be proved by testimony on oath. This case, however, falls within the exception necessarily engrafted upon that rule, viz. that an admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons. But (he afterwards adds) I think those decisions may be supported on the general principle, that an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money." After a careful examination of all the cases, I cannot find that *Searle v. Barrington* has ever been received with suspicion, or discountenanced by the profession. The principle laid down appears to me very plain and simple. I am, therefore, of opinion that this indorsement was admissible in evidence, being a declaration against the interest of the party making it, with no motive on his part to misrepresent it, and with perfect cognizance of the fact. I state that I do not found my judgment on the appearance of the bond, but that taking that and *Pybus's* evidence together, the indorsement was an act cotemporaneous with the execution of the bond; nor do I found my opinion on the indorsement being made in pursuance of the duty of the party making it, though it is



undoubtedly a strong circumstance of confirmation, but I rest my decision on the general principle clearly deducible from many cases (a).

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BOLLAND B.—As I was not present at the argument, I decline giving my opinion.

GURNEY B.—If I were to go again into the cases referred to by my learned brothers, I should repeat, in worse language than they have used, the same opinions. It is sufficient for me to say that the case falls within every principle summed up in the rule as laid down in Mr. *Phillipps's* book.

Rule discharged.

(a) The learned baron also observed, that he was counsel in *Bosworth v. Cotchett* in Dom. Proc. and that that case had probably occasioned 9 G. 4. c. 14. s. 3. which, however, did not apply to *bonds*.

LOYD and Others *against* HEATHCOTE and Others.

**D**EBT on a bond, subject to a condition, whereby, after reciting that whereas the said plaintiffs carried on the business of bankers in copartnership, and for their greater convenience in the said business had a banking house at *Manchester*, in the county of *Lancaster*, where their business was conducted and carried on under the firm of "*W. Jones, S. J. Loyd, E. Loyd & Co.*" and had another banking house in *London* aforesaid, where their business was conducted and carried on under the firm of "*Jones, Loyd & Co.*" Country bankers entered into bond conditioned to secure town bankers from loss by paying bills, &c. for the former, the condition expressly stipulating that all the monies to be ultimately recoverable on the bond should not exceed 1000*l.* Held, that a 5*l.* stamp was sufficient within 55 G. 3. c. 184. Sched. tit. *Bond*.

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And also reciting, that whereas the said defendants *M. Heathcote* and *J. Heathcote* had requested the said plaintiffs to draw bills of exchange from *Manchester* aforesaid, on their said house in *London*, for the use and benefit or on the account of them the said defendants *M. Heathcote* and *J. Heathcote*, and to permit them the said *M. Heathcote* and *J. Heathcote* to draw on the said house in *London*, of them the said plaintiffs, all such bills of exchange as they the said *M. Heathcote* and *J. Heathcote* should or might, at any time or times thereafter, have occasion to draw or cause to be drawn, and also to furnish and supply the said *M. Heathcote* and *J. Heathcote* with and to lend and advance to them, and pay on their account from time to time, all such cash, bank notes, bank post bills, and other negotiable bills of exchange and promissory notes, as the said *M. Heathcote* and *J. Heathcote* might from time to time require; and also from time to time to discount for the use and benefit or on the account of the said *M. Heathcote* and *J. Heathcote* bills of exchange, promissory notes, and other negotiable securities; and also to permit and suffer them the said *M. Heathcote* and *J. Heathcote* to keep a cash account with them the said plaintiffs, and to be furnished by them with cash for the use, convenience, or accommodation of them the said *M. Heathcote* and *J. Heathcote*: And also reciting, that whereas the said *M. Heathcote* and *J. Heathcote* might have occasion to draw promissory notes payable, or which might be made or become payable, at the said banking house in *London*: And also reciting, that whereas changes and alterations might from time to time take place as to the persons who carried on, or who might carry on, the said business as bankers and copartners for the time being, as well by the death or retiring from time to time of one or more of them the said plaintiffs, or of

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any future partner or partners, as by the introduction or coming in from time to time of one or more new partner or partners, and changes and alterations might also from time to time take place in the firm or style, as well of the said house in *Manchester* as of the said house in *London*: And also reciting, that whereas for the purpose of securing, or in part securing, the amount for the time being due or owing, or to become due or owing, from or by the said *M. Heathcote* and *J. Heathcote* to the said plaintiffs, or any one or more of them, solely or to them, or any one or more jointly with their or his partners or partner for the time being, for or by reason or means of bills or notes drawn or to be drawn, or to be made or to be or become payable in manner aforesaid, or for or by reason or means of cash, bank notes, bank post bills, or other bills or notes furnished or supplied, lent or advanced, or paid, or to be furnished or supplied, lent or advanced, or paid, in manner aforesaid, or by reason or means of bills or notes or other securities discounted or to be discounted in manner aforesaid, or for or by reason or means of cash advanced or to be advanced on the said cash account, or on any other account whatsoever, or for or on account of any other transactions, dealings, matters or things whatsoever, they the said *M. Heathcote* and *J. Heathcote*, and the said defendant *William Heathcote*, as their surety, had agreed to become bound to the said plaintiffs in and by the said obligation, subject to such condition and proviso thereafter written, expressed and declared; (that is to say): And the condition of the said obligation was declared to be such that if the said *M. Heathcote* and *J. Heathcote* or either of them, their or either of their heirs, executors or administrators, or any of them, did and should from time time and at all times thereafter, well and truly pay or remit to the said plaintiffs, their executors, ad-

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ministrators or assigns, cash or good bills of exchange, or other good and sufficient effects, to their liking and approbation, sufficient in amount and value to pay and discharge, and in order to pay and discharge all and every such bill and bills of exchange, promissory note or promissory notes, as should be drawn, as well upon or by them the said plaintiffs, or any one or more of them solely, as upon or by them, or any one or more of them jointly, or as partners or partner with any other person or persons, or by any one or more or all of the parties for the time being in the said banking concern, on account thereof, by or for the use or benefit or on the account of the said *M. Heathcote* and *J. Heathcote* or either of them, at or before the time or several times when the same bill or bills of exchange, promissory note or promissory notes, should respectively become due, and also sufficient to pay and discharge, and in order to pay and discharge all and every sum or sums of money due or to become due, as well to them the said plaintiffs or any one or more of them jointly with such partners or partner for the time being as aforesaid, for or by reason or means of all and every the said bills or notes so drawn, or to be drawn as aforesaid, or for or by reason or means of cash, bank notes, bank post bills and other negociable bills of exchange and promissory notes so furnished or supplied, lent or advanced, or paid, or to be furnished or supplied, lent or advanced, or paid as aforesaid, or for or by reason or means of such bills of exchange, promissory notes or other negociable securities so discounted or to be discounted as aforesaid, or for or by reason of any monies to be advanced or paid to or on the account of the said *M. Heathcote* and *J. Heathcote*, or either of them, on the said cash account, in anywise or on any other account whatsoever, together with discount, postage of letters, interest and commission on the same

bills, notes, securities, and monies, or for or by reason or means of any other dealings, transactions, matters or things whatsoever, had or to be had, as well between the said plaintiffs, or any one or more of them solely, as between them or any one or more of them jointly with such partners or partner, for the time being as aforesaid, and the said *M. Heathcote* and *J. Heathcote*, or either of them, in anywise howsoever; and if the said *M. Heathcote* and *J. Heathcote*, and each of them, their and each of their heirs, executors and administrators, and every of them, did and should from time to time when thereunto required by the said plaintiffs, or any one or more of them, or the executors or administrators of the survivor of them, join with them, or any or either of them, in stating, settling, and doing a final account and settlement touching and concerning all and every such bill and bills of exchange, promissory note and promissory notes, cash, bank notes, bank post bills and other negotiable securities as aforesaid, and of and concerning all and every such furnishings, supplyings, advances, loans, payments, discounting, cash transactions, and all other transactions, dealings, matters and things as aforesaid. And also did and should well and truly pay unto them the said plaintiffs, their executors, administrators or assigns, all and every such sum and sums of money whatsoever, as should upon the settling of such accounts be due or owing as well to them the said plaintiffs, or any one or more of them solely, or to their or any of their executors, administrators or assigns, as to them or any one or more of them jointly, with such partners or partner for the time being as aforesaid, or to the executors, administrators or assigns of them the plaintiffs and such partner or partners as aforesaid, or any of them, when and as the same should respectively become due, for the purpose of duly paying and satisfying the same,

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then the said obligation should be void, otherwise to be and remain in full force and virtue. And it was by the said condition provided always, and it was thereby declared to be the true intent and meaning of the said writing obligatory, that the whole amount of monies to be ultimately recoverable by virtue of the said obligation should not exceed the sum of 1000*l*.

The breach is immaterial to this report. The defendant pleaded non est factum and several special pleas. One of the special pleas traversed the fact, that any bills were drawn on plaintiffs, by and for the use and benefit and on account of the defendants *M. and J. Heathcote*.

At the trial before *Bolland B.* at the *Guildhall* sittings after last *Trinity* term, the execution of the bond being admitted, it appeared on cross-examination of the plaintiff's clerk, that sums far exceeding 1000*l*. had been advanced and paid by the plaintiffs for the defendants since the date of the bond; and it was objected for the defendants that the bond should have had a 25*l*. instead of a 5*l*. stamp; because though the sum recoverable was limited to 1000*l*., yet the bond was intended to secure successive advances of uncertain sums far exceeding that amount, and made during an unlimited period. The plaintiff had a verdict for 992*l*. subject to a motion for leave to enter a nonsuit.

*Kelly* moved accordingly in last *Michaelmas* term. The condition limiting the sum to be paid embodies only the latter branch of the clause of 55 *G. 3. c. 184*. Schedule Part I. tit. *Bond (a)*, and does not limit the

(a) *Viz.* Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l*. duty shall be paid.

Where the money secured, or to be ultimately recoverable thereupon shall be limited not to exceed a given sum, the same duty shall be paid as on a bond for such limited sum.

sums to be secured, which far exceeded 1000*l*. Had both been limited, the common duty would be payable, but the sum here secured is not limited, though the sum recoverable is. The dictum of *Wood B.* in *Scott v. Alsopp* (a) applies. "It is said that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but I should have doubted whether it would not then have been liable to that duty, if it had been given to secure a final balance on account current." He also mentioned the other point taken at the trial.

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*Coltman* and *W. H. Watson* showed cause. *Scott v. Alsopp* differs from this case in the essential particular, that that bond being to secure sums advanced and to be advanced in account current, no express clause limiting the sum to be recovered there existed. It was therefore argued, that the penalty "limited" the amount to be recovered, but the court held that the intended effect of the condition was to be ascertained without regard to the amount of the penalty (b); and that that effect being to secure payment of a final balance, the larger duty was payable. The obiter dictum of *Wood B.* was elicited by what had been said by the chief baron as to the act contemplating an express limitation to be provided by the condition, and has never been acted on. In *Williams v. Rawlinson* (c) it was held, that where the condition of a bond was to reimburse the obligee such sums as they should pay during ten years on account of discounting bills, &c. "not exceeding the sum of 5000*l*. in the whole," the amount of the stamp was to be measured by that sum.

(a) 2 Pri. 20.

(b) See per *Bayley J.* 1 Bar. & Adol. 353, *Dickson v. Cass*.

(c) 3 Bing. 71.

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In *Dickson v. Cass* (a) the sum secured was not to exceed 1000*l.*; but as those obligees were entitled to recover not only 1000*l.* on the bond, but a further sum for banker's charges and commission accruing thereon, the court thought the bond was given to secure not 1000*l.* only, but for 1000*l.* and the banker's charges, and therefore required a 25*l.* stamp. The present point, if tenable, might have been taken in that case.

*Kelly* contra. The words of the statute are in the alternative, and must be read strictly as part of a fiscal law. Then *or* cannot be read *and*, as the argument assumes. This bond is not given for money secured, *and* ultimately recoverable, but only for money ultimately recoverable. '[*Bayley* B. What is the total amount of the sum secured? Is more secured than is ultimately recoverable? This case is the converse of *Halse v. Peters* (b).] It secures successive balances of unlimited amount due from time to time, and the legislature may have meant to make a difference between persons who, as in *Mason v. Pritchard* (c), have a security to be discharged by the payment of the first sum only, and those who hold a continuing guarantee covering sums of indefinite extent.

BAYLEY B.—The words of the acts must be less equivocal in order to charge the subject with the larger stamp duty as proposed. But both clauses which have been cited seem to me to bear a very plain construction. The words "total amount of money secured or to be ultimately recoverable thereupon," seem to me to be synonymous. Two modes of expression have been adopted meaning substantially the same thing. But even if these terms are equivocal, still, unless the language of the act is plain, the subject

(a) 1 B. & Adol. 343. (b) 2 B. & Adol. 807. (c) 12 East, 227.



is not bound to pay the higher duty. Now what is the sum "secured" in this case? The sum ultimately recoverable under the bond. Then the condition, in language adapted to meet the act of parliament, says that the whole amount of monies to be ultimately recoverable by virtue of the said obligation shall not exceed 1000*l*. This, therefore, is a bond in which the money secured and ultimately recoverable is limited to 1000*l*. Then why is not a 5*l*. stamp sufficient? The words of the act "to be ultimately recoverable," seem to me calculated to meet cases of this description, where a floating balance is secured by a bond which can be put in force once and once only.

VAUGHAN B. — This bond appears to have been drawn with the particular intention of applying to the branches of the stamp act which have been cited. The limit is fixed by the bond at 1000*l*., for no more can be said to be secured or ultimately recoverable upon it. Then a 5*l*. stamp is the proper one.

BOLLAND B.—I entertain no doubt on either point. The first set of duties being imposed on fixed sums, the clauses applicable to floating balances, limited and unlimited, are subjoined. I think the wording of them to be in effect synonymous; but no difference can arise between them here, where 1000*l*. is the sum secured and ultimately recoverable, and therefore is a sum limited as if no floating balance was contemplated.

Rule discharged.

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## KING Gent. one &amp;c. against SKERFFINGTON.

The court set aside a writ of summons in assumpsit, for irregularity in not strictly pursuing the form laid down in 2 W. 4. c. 39. schedule, Form No. 1.

A notice of declaration is irregular if it would include a different form of action from that in the writ.

**T**HE writ of summons was, in an action of "trespass on the case upon promises," indorsed with a claim of 12*l.* 7*s.* debt and 1*l.* 15*s.* costs. The notice of declaration was of *Michaelmas* term in an action of "trespass on the case." *Law* obtained a rule to set aside the proceedings for irregularity, on the ground of variance between the writ and notice of declaration, and also because the writ varied from the form 2 W. 4. c. 39. schedule No. 1, which describes assumpsit as "an action on promises."

*Hutchinson* showed cause. First, as to the writ, the form thereof in the schedule is in "an action on promises" [or, *as the case may be*]. An action on promises was only mentioned as an instance to show that the kind of action must be set forth, but no adherence to the form in terms is made necessary. [*Bayley B.* This is an action on promises; the writ shows that, but the notice of declaration may be in an action on the case, not on promises; and if the action prove to be other than assumpsit, the true cause of action is not specified.] That only affects the notice of declaration. The writ is good within the act, which only requires the form of action to be stated, and no minuter particulars of the cause of it.

**BAYLEY B.**—The act specifically provides by sect. 1 that the writ shall be according to the form No. 1 in the schedule. Now the form there laid down in assumpsit, is "in an action on promises." We ought in this case to enforce the adoption of the strict form. It was an expression of the noble and learned framer of the act that he hated equivalents.

VAUGHAN B.—We are bound to adhere to the strict form prescribed by the act in order to promote its great object, uniformity of practice.

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GURNEY B.—If we discharged this rule, the effect would be that the court would be occupied by frequent discussion, what deviation could be allowed from the form prescribed.

Rule absolute.

PENNINGTON and Wife *against* HEALEY, Administrator of WILLIAM HEALEY deceased.

**D**EBT on bond given by the deceased intestate conditioned to pay the plaintiff's wife an annuity. Plea, plene administravit. Replication, assets in defendant's hands to be administered. The deceased and *John Healey* the defendant were sons of the female plaintiff by her former husband. In *June 1823*, the intestate left his house in *Lincolnshire*, having 700*l.* in money, and intending to go to *America*, but died at *Liverpool* in the *October* of that year, at the house of one *Jones*, who during his sickness, or before he died, possessed himself of the above sum. This was not discovered till 1825, in the *October* of which year the defendant took out letters of administration to his effects, sworn to be under 800*l.*, arrested *Jones*, and recovered a verdict against him for 750*l.* in an action tried at the *Chester* assizes in the spring of 1826.

An administrator having arrested a debtor to the intestate for money of the intestate had and received to the defendant's use, obtained a verdict and charged him in execution. The defendant obtained a rule for a new trial, and petitioned the insolvent court for his discharge. Under these circumstances the debtor requested to be

discharged on payment of a sum considerably less than that recovered in the action, and less than the costs. The administrator consented to the terms, and the debtor was liberated. A creditor of the intestate sued the administrator. Held that the administrator was not personally liable, as for assets, for any part of the sum given by the verdict against the debtor, and was not guilty of *devastavit* in permitting his liberation.

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A rule nisi for a new trial having been granted; *Jones*, who on his arrest was taken to the prison at *Lancaster* and had remained there, gave notice of his intention to take the benefit of the insolvent debtors' act, and after filing his petition obtained his release in *December* 1826, by order of the plaintiff's attorney, on payment to the plaintiff of 150*l.*, a sum which was exceeded by the costs of the action against him by the administrator. At the trial before *A. Park J.* at the last summer assizes for *Lincolnshire*, the defendant had a verdict.

*N. R. Clarke* obtained a rule for a new trial, on the ground that the defendant by discharging *Jones* had rendered himself personally liable for the whole sum of 750*l.* as for assets showed in certainty by the verdict. He cited *Brightman v. Keighly* (a).

*Adams Serjt.* showed cause. The case cited is distinguishable, because the executor there *released* the debtors to the estate from all actions; so that unless he had been held liable, the creditors and legatees would have been deprived of the assets. For that reason the law presumed he had recovered as much as he had so voluntarily released. [*Bayley B.* An executor is liable for all which he receives, or which in the honest discharge of his duty, and without gross negligence, he might have received. In *Brightman v. Keighly* he made a most unreasonable bargain as regarded the creditors of the deceased; but after taking fruitless steps to procure payment by imprisoning the debtor in execution, he may exercise a prudent discretion as to the terms of settlement with him, taking care to obtain all he can. It was for the plaintiff to make out

(a) Cro. Eliz. 43.

that this executor could have got more than 150*l.* from *Jones*, and not for the defendant to prove that he could not.] The question was, whether the defendant had acted honestly in making the compromise, and the jury showed by their verdict that they had thought it no unreasonable mode of ending the matter. The discharge of *Jones* was not by any voluntary act or connivance of the defendant, but no better terms could be looked for when *Jones* had obtained a rule for a new trial, and had also petitioned to take the benefit of the insolvent act.

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*N. R. Clarke* in support of the rule. It was not left to the jury to find whether the compromise was fair or not, or whether it was the best that could be made; but, on the contrary, whether it was fitting that the defendant should be called on to pay from his own funds money which he had never received. The whole sum recovered against *Jones* became assets in the defendant's hands as soon as he compromised the debt with him. Thus in *Brightman v. Keighly, Anderson J.* said, "The doubt was where it was uncertain what he released, and for that only an account lieth; but here the certainty appeareth by the verdict." *Periam J.* added, "If an executor doth release an account, and it is not certain what he shall recover, it is not assets; but if it appear or be proved that so much was due, it is." Again, *Wentworth*, in his Office of Executor (a), in defining a devastavit, says, "If an executor upon a bond of 200*l.* forfeited for payment of 100*l.*, accept the principal, or perhaps also some use, costs, or damage, and give a release or acquittance of the whole forfeited bond, or of all actions, or upon record acknowledge satisfaction upon judgment had,

(a) P. 158, edit. 1774.

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this is a wasting of so much as the penal sum is more than is received, and so far his own goods stand liable to creditors not satisfied; and so, doubtless, is it if he do but give up the bond having no judgment upon it, though he neither make release or acknowledge satisfaction." *Bac. Abr. tit. Executors (L)* is, "If the executor releases debts due to a testator, this shall charge him to the value of the debt, though perhaps he did not receive near so much; so if he releases a cause of action accruing either in the life-time of testator or in his own time in right of the testator, this will be a devastavit." Then this abandonment of all claim to the debt is a devastavit, making the administrator liable. In *Kniveton v. Latham (a)*, *Berkeley J.* held that the giving a discharge of an entire bond, viz. of the penalty after payment of principal, interest, and damages, was a devastavit. [*Bayley B.* That is too strong a position (*b*).] *Comyns's Digest, tit. Administration (I 1)* is, "So 'tis a devastavit if an executor release or acquit, the bond being forfeited."

[*Bayley B.* The question in this case is, Whether the executor is chargeable if he made a reasonable agreement of compromise, and got all he could, when in all probability he could not have got any thing else? The cases cited apply to his making a release where it is not reasonable to do so. Perhaps they do not apply where a release is given after payment of all that is really due.] This must be determined as at law, and any relief must be in equity. *Mr. Williams*, in his *Law of Executors*, 1108, says, "Where the executor delivered up a bond due to his testator and took a new bond with surety to himself for the debt, it was held that this, though not a conversion in law, was none

(a) *Cro. Car.* 490.

(b) And see *S. C.* per *Brampston C. J.* and *Dampart C. B.* Also *Russell's case*, 5 *Rep.* 27.

in equity; *Armitage v. Metcalfe* (a). The executor's liability at law is there admitted. [Bayley B. The court of equity would send the question of reasonable compromise for trial by a jury. In *Russell's* case (b), the court held a release by an infant executor should not bind him, because if it were to be held otherwise, it would be a devastavit. [Bayley B. No reasonable compromise appears there. Is there any case where the executor has been held liable de bonis propriis, where, after taking steps to enforce payment by imprisoning the debtor, he became insolvent, and the executor took all he could get under a bona fide compromise?] An executor cannot change the nature of his security; *Cock v. Jenner* (c), *Blue v. Marshall* (d).

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*Cur. adv. vult.*

BAYLEY B. afterwards delivered the judgment of the court, as follows :

The question in this case arose on a plea of plene administravit. There was no evidence that the defendant had actually received any assets ; but it was contended that he was liable in respect of having compromised the demand against a debtor of the intestate, and having discharged him from prison. Executors and administrators are chargeable if they have received assets, or if assets might have been received by them ; also, if they have taken a new security, or if they have given a release for a debt ; if, in fact, they have changed the nature of the security, or, without an adequate cause, have disabled themselves from suing for or obtaining debts which might have been recovered. Now it is on the latter ground that it is said that the present defendant is chargeable. The facts are these : *Jones*

(a) 1 Chanc. Cas. 74.

(b) Or, *Russell v. Prat*, 5 Rep. 27.

(c) Hobart, 66.

(d) 3 P. Wms. 38.

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was indebted to the intestate. The present defendant sued him, and obtained a verdict against him for 750*l*. *Jones* moved for a new trial, and a rule nisi was granted. *Jones*, on being arrested on mesne process in this action, went to *Lancaster* Castle, and remained there from the spring of 1826, until the month of *December* in the same year. At that time he proposed terms, and those terms were, that he should be liberated on payment of the sum of 150*l*., and the administrator, in the exercise of his discretion, agreed that he should be so liberated; all that was received was 150*l*., and the expenses of the administration and the suit exceeded 200*l*. The plaintiff contended, that the liberation of *Jones* was a devastavit in the defendant, and made the defendant answerable to the extent to which *Jones* was answerable; and he cited *Brightman v. Keighly* (a), *Cock v. Jenner* (b), and several other authorities in support of that position. The case of *Brightman v. Keighly* certainly does decide, that if an executor releases a debt, he admits assets to the amount of such debt; and *Periam J.* gives the reason for it, "that the law presumeth he has received so much as he doth release." There is a dictum to the same effect in *Hobart* (c); "If an executor release, the debt released is judged assets in his hands." There are many other cases put in the books, but they are all cases in which there was an actual release, and in which it does not appear that the executor had any reason for giving the release, or that he gave it upon an honest compromise. This is a case in which the release is by operation of law. The administrator has here adopted the course most likely to obtain payment of the debt by pressure and suing the debtor; and I should say, that it would be monstrous, if the law were

(a) Cro. Eliz. 43.

(b) Hob. 66.


(c) Ibid.



as contended for on behalf of the plaintiff. If the law were as contended for, an executor or administrator must either keep the debtor in gaol all his life, or be liable to any creditor to the amount of the debt; and not only to any creditor, but to the next of kin. I have looked into the authorities, and can find none which supports so monstrous a proposition; and I should be sorry if I had. The true question is this—does the party exercise a reasonable and honest discretion in making the compromise? If so, it seems to us that the executor is protected, not only by going into equity, but at law. The general rule of law is, that the executor is accountable for all which he has received, or which, in the honest discharge of his duty, he could or might obtain. Now, in this case, the compromise was for the payment of 150*l*. Great expenses had been incurred exceeding that sum. The debtor had lain in prison a considerable time, and had petitioned the insolvent court for his discharge. Then, if the administrator could extricate himself from the responsibility in which he had been involved by the letters of administration, and could reimburse to himself the costs incurred, it seems to me that it was a fair and reasonable compromise. If, in this case, the plaintiff had been disposed to take the opinion of the jury on the question, whether the compromise was or was not fair or reasonable, the learned judge was ready so to leave it; but I think, looking at the evidence, that no jury would have considered it unfair or unreasonable. There is a good reason why, in many cases, the taking a new security should render the executor liable. In many instances it extinguishes the original debt, and is a quasi payment to the executor; and in many cases, on the death of the personal representative, the right to sue would go in a different channel. The administrator *de bonis non* would be the person to sue on the

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original bond, and the executor of the administrator on the new one. We are therefore of opinion that the administrator in this case has not rendered himself liable, and consequently that this rule should be discharged.

VAUGHAN B. concurred.

GURNEY B.—In *Kniveton v. Latham* (a), three of the justices out of the twelve held, that the release by the executor, upon receipt of the principal money and interest, was not a devastavit; and on this ground, that what the executor had done was no more than what in justice and equity he ought to have done.

Rule discharged.

(a) Cro. Car. 490.


#### ADAMS *against* GRANE and OSBORNE.

Goods deposited on the premises of an auctioneer for the purposes of sale, are privileged from being distrained for the rent of those premises.

**T**ROVER for beds and other household effects.

The plaintiff, a wholesale bed manufacturer and dealer in furniture, sent the goods in question to the sale rooms of one *Mott*, an auctioneer, for sale, on commission at an auction then advertised by bills, &c. and stuck up in the neighbourhood, to be about to take place under an assignment for the benefit of creditors. The rooms were situate on the lower floor of a house in *New Bridge Street, Blackfriars*, let by the defendant *Osborne* to one *Armstrong*, who had fitted up that part of it for the purpose of letting to auctioneers to hold their sales in. "*Armstrong's Auction Rooms*" being painted on the outside, *Mott* hired the rooms of

*Armstrong* for a week for the purpose of holding the above sale in them. The goods were deposited on a *Saturday*, and on *Monday*, while on view, they, with many other articles sent by other manufacturers, were distrained for rent previously due from *Armstrong* to the defendant *Osborne*. At the trial before *Vaughan B.* at *Guildhall* in this term, the plaintiff was nonsuited, with leave to move to enter a verdict for the value of the goods, if the court should be of opinion that the action could be maintained, and that the goods deposited as above were privileged from distress.

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*John Evans* having obtained a rule accordingly,

*Platt, Follett, and Channell* for the defendants, showed cause. The question is, whether the goods of a third person deposited for sale on the premises of an auctioneer are privileged from distress for rent due for those premises? The general rule being, that a landlord has a right to distrain whatever chattels he finds on the demised premises, whether in fact belonging to his tenant or a stranger, unless they fall within some of the privileges acknowledged to protect particular articles from distress (*a*); it is for the plaintiff to establish that the present distress falls within some such exception. A privilege from distress has been hitherto allowed to goods deposited with particular persons for the public convenience and security of trade in general, as in the cases of goods at an inn, or in the hands of a factor, or of a carrier during a journey; but it has never been extended to goods sent for the purposes of particular trades, or why should not carriages standing at livery be privileged, which would

(*a*) *Com. Dig. tit. Distress*, (B. 1.); 3 *Bl. C.* 8, and 2 *T. R.* 601; 4 *T. R.* 568; *Burrow*, 1500; *Salkeld*, 250; 3 *Brod. & B.* 79.

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be contrary to *Francis v. Wyatt* (a). [*Bayley* B. Part of the ground of that decision was, that the carriage was put up in the coach-house for a permanency, and that its owner was therefore occupying the coach-house as an under-tenant for a year (b).] Taking this as a ware-room the same reasoning would apply here. [*Bayley* B. Livery-stable keeping is not more a public trade than that of an auctioneer. In *Wood v. Clarke* (c) the frame sent by the manufacturer to his workman's house to work up goods on was held not privileged from distress, because such a privilege was not considered necessary for the protection of trade taken in its public and large sense. The authorities are there collected, and *Co. Lit.* 47 a, 3 Bla. C. 8, there stated at length, rest on the same reasons. This privilege is only allowed to exist where to withhold it would affect the public convenience in a serious manner. Therefore, as in common life, goods must be sent to market for sale, corn to be ground, cloth to be made up, horses to be shod, &c. such chattels are protected from distress at those various places in order to prevent the inconvenience of having such works done at home (d). *Blackstone* says, that the common presumption is, that the corn at a mill belongs not to the miller but his customers. This however is not the sole ground of the privilege, for the similar presumption which arises as to carriages at a livery-stable has not prevailed. In *Gilman v. Elton* (e) goods of a principal on a factor's premises were held privileged from distress for rent

(a) Bla. R. 483; 3 Burr. 1498.

(b) See the argument of Serjeant *Nares*, 3 Burr. 1499; and of *Blackstone*, S. C. Bla. Rep. 484.

(c) 1 Tyr. 314.

(d) See per *Blackstone* arguendo, *Francis v. Wyatt*, 1 H. Bla. 484.

(e) 3 Br. & B. 75.

due from the factor for those premises; but though factors may be necessary for the purposes of international commerce, auctioneers are not so for those of domestic trading or sales of goods. In that case *Dallas C. J.* adopts what *Ashurst J.* thus said in *Gorton v. Falkner* (a): "The foundation of this principle is, that as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there;" and in another place, "the exceptions out of the general rule are all of them tending to the benefit of trade and commerce and general advantage." To which the chief justice adds, "The rule was evidently founded not on natural but artificial arrangements." *Park J.* says, that the language of Lord *Holt*, in *Gisbourn v. Hurst* (b), shows that the exception was not established for the benefit of the individual but of trade in general; he (Lord *Holt*) extends it to goods to be carried, wrought, or managed; and are not goods placed in the hands of a factor to be managed? Both the other judges rest their decisions on the advantage of trade in general. The privilege is said, in *Gisbourn v. Hurst*, to extend to goods sent to be "managed." That word will be cited as applicable to the present case, but *Gilman v. Elton* proceeded on the necessity to afford protection to trade in a more extended sense. There is nothing in this case to show that the privilege claimed is requisite on that ground. [Lord *Lyndhurst C. B.* In *Simpson v. Hartopp* (c), the chief justice *Willes* adopts the language of *Gisbourn* and *Hurst*, saying that things delivered to a person exercising a public trade to be carried, wrought, worked up, or *managed* in the way of his trade or employ, were not distrainable at common law. And in *Gilman v. Elton* the word "ma-

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(a) 4 T. R. 568.

(b) Salk. 249.

(c) Willes, 516.

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naged" is held to apply to the employment of a factor.] That construction was there given to the word for the sake of trade in general, but it has not received it elsewhere. [*Bayley B.* Many cases show that the exemption exists where goods are sent to particular places to be sold, *e. g.* to markets (*a*). Lord *Lyndhurst C. B.* What is the distinction between a factor and an auctioneer? The general description of a factor is a person who receives goods into his custody for the benefit of another, in order to sell them for that other. Does the mode of selling used by an auctioneer form the subject of distinction? The difference between a factor and a broker is, that the first is in possession of the goods, while the other is a mere medium of communication between the buyer and seller, the goods remaining in the seller's hands till received by the buyer. If an auctioneer sells my goods on my premises, but has never had possession of them, he may be only a broker, but is otherwise if he has. *Bayley B.* A broker is a mere agent without possession, but the object of both factor and auctioneer is to offer goods personally to the sight of the buyer, and to bring him and the seller together.]

Besides, the privilege from distress originated in the common-law obligation, under which persons exercising public trades, *e. g.* innkeepers, carriers, tailors, and smiths, were bound to take in goods sent to them for the purposes of such trades (*b*). A livery-stable-keeper not being bound to receive the carriage, it was held to be distrainable, *Francis v. Wyatt*. From *Roll. Ab. Distress*, 668, pl. 12. and *Co. Lit.* 47 *a.* the reason of privilege from distress appears to be that the goods

(*a*) 1 *Roll. Ab.* 668, pl. 11, *Co. Lit.* 47 *a.*

(*b*) See *Year Book*, 22 *Edw.* 4, 49, cited 3 *Burr.* 1499; *Bro. Abr. Distress*, pl. 56, *Brian C. J.* 251, pl. 66.

are protected for the benefit and maintenance of trade, as they are at the hostry, smith's shop, &c. by authority of law. The innkeeper's right of lien on a horse for his keep arose in like manner (a). For this reason, as the livery-stable-keeper is not bound to receive a carriage, it was held distrainable on his premises, being received there on a private contract; *Francis v. Wyatt*. Nor was the auctioneer bound by any obligation of law to sell these goods, but reserved them on a private contract; a distinction clearly shown by *Popham C. J.* in the case of *De Hosteler* (b). In every case of allowing this privilege before *Gilman v. Elton*, the old common law rule was adhered to, and the party in possession of the goods was compellable to receive them and had a lien. [Bayley B. That distinction runs through all the cases before *Gilman v. Elton*, and before that case the old common law rule prevailed, that a landlord has a right to distrain all goods found on the premises. Lord *Lyndhurst C. B.* *Thompson v. Mashiter* (c) established that goods landed on a wharf and deposited in a warehouse thereon by the consignee, a factor, for sale at a convenient opportunity, are not distrainable for rent due for the wharf and warehouse.] That case merely followed *Gilman v. Elton*, which was expressly grounded on the fact found in the case, viz. being in the usual course of a public trade, and does not interfere with the old rule. This transaction does not appear to have been in the usual course of trade, or for its general benefit. [Bayley B. There is no such trade as a man's opening a shop for sale of goods and being bound to sell every thing brought to him. The present is in the usual course of an auctioneer's business. Though a lien may not exist or may be taken away, the privilege from

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(a) 14 Viner, 438.

(b) Popham, 66.

(c) 1 Bing. 253.

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distress may remain. Thus if I send corn to a mill to be ground within two months on a contract to pay for the grinding at the end of that time, it would not be distrainable, but the lien would be gone.] Nevertheless the right to lien and that of exemption from distress rest on the same origin, viz. the original compulsion on certain public trades to receive goods to be "carried, wrought, worked up, or managed." But here the auctioneer represented the goods sold as being the property of a person residing on the premises. If a true statement, the distress is legal; if false, it is like a mock auction and a fraud, which ought to divest any right to the privilege claimed. [Bayley B. How does the plaintiff who sends his goods to be sold know it is a mock-auction?] The auctioneer acts not as a person carrying on a trade, but as an agent for the seller. [Lord Lyndhurst. The selling several persons' goods at one sale does not make it a mock-auction. The plaintiff might have asked when an auction would take place and have sent his goods. One sort of mock-auction is where puffers appear to bid, but no real bidding takes place; another, where an empty house is taken in order to receive furniture which is afterwards intended to be sold as the genuine furniture fitted and belonging to that house. But supposing this to be the case of an ordinary factor, would his misrepresentation of the quality of the goods which he was authorized to sell, deprive them of their acknowledged exemption from distress? Any impression which might have arisen from reading the notices of sale that this furniture actually belonged to the premises, would have been removed by reading "*Armstrong's* auction rooms" over the door, and seeing a quantity of newly-manufactured furniture there for sale.] *Gillman v. Elton* went beyond the former cases for the benefit of trade. It was not meant to be extended in *Thompson*



*v. Mashiter*, nor does an auctioneer carry on trade so as to be within the spirit of the rule respecting the old and public trades of innkeepers, &c.

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*John Evans* and *J. Jervis* contra, were stopped by the Court.

LORD LYNTHURST C. B.—I am of opinion that these goods are not liable to distress. In *Gillman v. Elton*(a) it was decided by the court of Common Pleas, that goods sent to a factor to be sold are protected from distress for rent due from the factor. Nothing turns on the circumstance of the consignor living at a distance, for goods delivered to a factor living in the same town with the owner or manufacturer, would be equally protected when in possession of the factor for the purposes of sale. The present is the case of an auctioneer. What is a factor? A factor receives the goods of others for the purpose of selling them on account of the owner, receiving commission for so doing. What is an auctioneer? An auctioneer receives goods of others for the purposes of sale, for the benefit of the owners of those goods, and receives compensation for his trouble. The reasoning applicable to the case of an ordinary factor applies equally to that of an auctioneer, and the different modes of sale make no difference. But it was said that this was not the ordinary course of business of an auctioneer, because it was not usual for an auctioneer to sell the goods of others on his own premises, but, on the contrary, it was his business to go on his employer's premises to sell the goods there. This seems to me to be an entire mistake. Every one must have seen that in this vast city the most precious works of art, of painting and sculpture,

(a) 3 Brod. & B. 75.

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as well as other property of every description, is deposited on the premises of auctioneers for the purposes of sale. The course of dealing in this case has been that long established between similar parties for their mutual benefit and convenience. But it was also said that there was in this case something like fraud, from a false representation that the goods sent to the auctioneer for sale were goods which had been assigned over for the benefit of creditors; and that in consequence of this false representation the goods were not protected. Now whatever might be the consequence of that representation of the auctioneer if it was false, yet so far as relates to any contract between him as agent of a vendor and a party purchasing on the faith of that representation, it does not appear to me that it can affect a case like the present, where there was no contract between the owner of the goods and the landlord of the premises. There is no weight in that objection. The question is thus brought to *Gillman v. Elton*, the grounds of which case have been uniformly acted on since, and, in my opinion, ought to govern the present case. I am therefore of opinion that these goods were not liable to the distress, and that this rule should be made absolute.

BAYLEY B.—I am of the same opinion. The first question is, whether the goods in the custody of an auctioneer on his premises, are or are not privileged from liability to distress for rent due from him for his auction rooms, and I am of opinion that they are; and I think that they are so privileged for the convenience of trade and the general benefit of the public. The exemption of many articles from distress has been established for a very considerable length of time. *Coke*, in his commentary on *Littleton*, treats of it as being

well known at that time, and speaks of its principle as being established for the benefit and protection of trade. One of the instances he gives is that of "goods going to a fair or market." Why are such goods to be privileged? Because interest reipublicæ to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. It is highly beneficial to the manufacturer of goods and the handicraftsman to have some place of a public resort, where, after having made goods up on their own premises, they may afterwards dispose of them to better advantage than the situation of their own working places would, in all probability, admit of. They are encouraged therefore to manufacture by the ensuring them the probability of a sale in public places, where purchasers from time to time resort in great numbers. This privilege, therefore, is of great importance to the owners of goods, who should not be exposed to the risk of losing them from the default of the parties on whose premises they may be deposited for that purpose. The privilege has from time to time been increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor. I cannot fail to approve the observation which Mr. Justice *Blackstone* has made in his Commentaries, that the exemption from liability to distress in a case of this sort occasions no hardship, because the privilege is generally applicable to goods which no man could possibly suppose to be the property of the individual from whom the rent was due. The rent is due from the person who acts as auctioneer or factor, not being the party who sends the goods to the demised premises for the purpose of sale. So that if the goods of a third person are seized, they would be so seized not from the man who covenanted to pay the

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rent, but from a stranger; so that it would in fact be enforcing the payment of the debt of one man by taking the goods of another. The case of a factor is strongly analogous to that now in question, and the cases of *Thompson v. Mashiter* and *Gilman v. Elton* settle the point that the goods of a principal on the premises of a factor are exempted from distress for rent issuing out of the premises in which they are so deposited. The case of this privilege on a factor's premises is indeed stronger than the present of an auctioneer, for goods are usually deposited for a longer time at the warehouses of factors than at an auction room. Why are they protected? Because interest reipublicæ that goods should find their way to a factor's premises, which are a place of public resort for particular species of goods, which are more likely to meet a sale there than on the premises of the owner or manufacturer. Now what is an auctioneer? In substance only a species of factor. But whether that is so or not, his business has the effect of bringing together buyer and seller. The seller may wish, and in many cases may find it necessary, from the situation of his own premises at a place of no great resort, or from their value or other circumstances, that goods produced there should be sent to a place where the public have the opportunity of viewing and buying them. The public reap the advantage of seeing and comparing a variety of articles, and of buying them at a more moderate rate, on account of the competition in such a place; while the seller has the opportunity of bringing his goods to an almost certain market. In truth, the auctioneer is the medium by which the seller and buyer are brought together, and that seems to me to be one of the foundations on which this privilege ought to be allowed.

But it is said that if goods in the hands of an auctioneer may in general be protected, yet that these

goods ought not to be so protected, because it was a mock auction. But how is it such? It is said to be such because it is described in a handbill as an auction taking place for the benefit of creditors, under an assignment or bill of sale. But is that a mock auction where the party, as in this instance, intending and trying to sell his goods, does really and effectually sell them? There is no evidence that the owner of the goods knew of the handbill or its contents; but that is a question between the owner of the premises and the owner of the goods; and though puffing may vacate the contract between the buyer and seller at an auction, it will not take away the exemption, which, generally speaking, the law would confer on goods thus deposited.

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It was suggested by Mr. *Follett* that if this case was to be considered as depending on a question of public convenience, the defendant ought to have taken the opinion of a jury upon it in each particular case. But I am of opinion that it is in every case a pure matter of law to be decided by the court upon general principles, and not on isolated cases. On the ground of public convenience I am of opinion that these goods were privileged from being distrained for rent, and that the rule should be made absolute.

VAUGHAN B.—I am of the same opinion. As a first principle, all goods found on the demised premises, which are not affixed to the freehold, are *prima facie* liable to be distrained for rent. All the exceptions engrafted on this rule are to be found collected in *Simpson v. Hartopp* (a), and among the absolute exceptions is that in question. The instances put by C. B. *Gilbert* (b), and taken from *Coke on Littleton*,

(a) *Willes*, 512.

(b) *Gilbert on Distresses*, 35.

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47 a. are only mentioned by way of illustrating the principle, and not as enumerating the whole of the cases to which it may be extended. Then, what is the rule? It was laid down in *Gisbourn v. Hirst* on the principle I have alluded to, and has been recognized as a guide in all the cases which have since arisen in *Westminster Hall*. The words "carried, wrought, worked up, or managed in the way of trade or employment," ought not to be scanned with critical nicety, but should rather be read in a large sense, for the benefit of trade. A wharfinger, perhaps, does not "manage" goods, except you take his business as dealing with them in the order of his trade and employment. It was argued by Mr. *Follett* that the privilege from distress while on the premises, depended on the obligation of the owners of those premises to receive the goods to be carried, wrought, or managed, and that that obligation gave the latter a lien on the goods. But it is unimportant at the present period to inquire what was the foundation of the privilege, for though its origin may be so remote as to be doubtful, it is now laid down that the exemption exists for the benefit of trade and public convenience. The case, therefore, seems to me to fall within all the cases. They were cited and much considered in *Wood v. Clarke*, which again recognizes the principle I have alluded to. I should have great difficulty in saying that there is any difference between this case and that of a factor with whom goods are also deposited for sale. I do not say that an auctioneer is a warehouseman; though in practice goods are kept by an auctioneer at a charge for warehouse room till sold. How he was here paid does not appear, but that these goods were deposited on the premises for sale, in the way of *Mott's* general employ as an auctioneer. It is for the public convenience that facilities of this kind should be afforded. Whether the goods of one

man or many were deposited on the premises for sale makes no difference as to the exemption, even if it could for an instant be supposed to show any fraud. And the landlord cannot suppose that the auctioneer is "managing" these goods as his own.

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GURNEY B. concurred.

Rule absolute.

DOE on the several demises of WILLIAM PHILLIPS, JOHN JONES, and LEWIS MORRIS, *against* EVANS and LLOYD.

**EJECTMENT** for premises in *Llanarthen, Cardiganshire*. The following facts appeared at the trial at the last *Cardiganshire* assizes, before *Alderson J.* In 1794, the premises in question were mortgaged by the persons then seised in fee by appointment and demise for a long term of 1000 years. In 1797 *David Jones*, afterwards an insolvent, and father of *John Jones*, one of the lessors of the plaintiff, obtained the premises for 250*l.*, and they were by lease and release of the 1st and 2d *June* 1797, conveyed to him in fee, the term of 1000 years being assigned to one *John Moses* to attend the inheritance. *David Jones*, on his marriage in 1807, settled the premises on himself and his wife for their lives, and after their decease on their first and other sons, &c. The lessor of the plaintiff *John Jones* is their eldest son, *David Jones* being imprisoned under a ca. sa. in *August* 1820. On the

Proceedings had in an insolvent court while 1 G. 4. c. 119. was in force, may be proved by producing certified copies under the seal of the court, proved to be such, and purporting to be signed by the officer, that being the mode prescribed by 7 G. 4. c. 57. and without proving the signature of the officer as required by 1 G. 4. c. 119.

*Semble*, that 1 G. 4. c. 119.

s. 7. is directory only in respect to the proceedings before selling the insolvent's estate. *Semble*, that where the cestui que trust of a term vested in a trustee on trust to attend the inheritance is owner of the inheritance, the term may, by 29 C. 2. c. 3. s. 10. be seized under a fi. fa. against such cestui que trust.

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29 *December* following he petitioned for his discharge under the insolvent debtors' act, and executed the usual assignment to Mr. *Dance*, the provisional assignee, and also made out and subscribed his schedule. On 25 *August* 1821, he was discharged under the insolvent act. On 6 *November* 1828, *Dance* executed the usual assignment to *David Evans*, a creditor of the insolvent. A recovery of the premises having been suffered, *David Evans* sold the insolvent's life estate on the 13 *July* 1830, to his eldest son *John*, the lessor of the plaintiff, for 674*l.*, and conveyed it to him by indentures dated 11 and 13 *Dec.* 1830. By indentures of 14 and 15 *December* 1830, *John Jones* one of the lessors of the plaintiff, the insolvent *David Jones* and his wife, joined in a mortgage to *Morris*, another lessor of the plaintiff, to secure 1500*l.* and interest then advanced by him. On the 20th *October* 1830, letters of administration to the effects of *John Moses*, the assignee in 1797 of the residue of the term of 1000 years, were granted to *Thomas Jones* otherwise *Moses*, his son and one of his next of kin.

On the 15th *December* 1830, the said *Thomas Jones* otherwise *Moses* assigned the premises for the residue of the term of 1000 years to the lessor of the plaintiff, *Phillips*, in trust for said *Morris*, and after redemption by payment of the mortgage money, to the joint appointment of the said *John Jones* and his mother, and in default thereof to attend the inheritance. The proceedings in the insolvent court, *viz.* the petition for discharge of the insolvent, the assignment of his estate to *Dance* as provisional assignee, and his assignment to *David Evans* as general assignee, were proved by certified copies under seal of the insolvent court. Evidence was given that it was the seal of the court. Next were proved by like certified copies, the schedule,



the justices' adjudication (a) of *David Jones* being entitled to the benefit of the act, and the certificate of issuing the order for his discharge to the gaoler of *Cardigan* gaol.

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For the defendant, *E. V. Williams* contended, that the insolvent proceedings were not properly proved according to 1 G. 4. c. 119. s. 45. (b) and therefore that the legal estate being in the trustee for *David Jones* of the term of 1000 years, that term might be taken under an execution against *David Jones*. He then proved the minutes of a judgment, elegit, and inquisition thereon against him in 1826.

He submitted that though a moiety of the premises might be recovered by *Phillips*, the other lessors of the plaintiff claiming under the insolvent proceedings could not recover. He also urged that no notice of sale, or sale to *John Jones*, within two months after the assignment or by auction had been proved, conformably to 1 G. 4. c. 119. s. 7., and that their declaration contained no demise by *David Evans* the general assignee. *Alderson J.* was of opinion that the plaintiff was entitled to recover the whole as to one moiety, but gave leave to the defendant to move to restrict the verdict for the other moiety only. Verdict for the lessors of the plaintiff for the whole. A rule having been obtained accordingly,

*J. Wilson* and *Chilton* showed cause. The objection upon the insolvent acts was not that the assignments were not sufficiently proved, but that the lessors

(a) By 5 G. 4. c. 61. s. 1. the powers of justices in sessions under 1 G. 4. c. 119. were saved in *Wales*, and similar powers were conferred on them by 7 G. 4. c. 57. s. 41., which was continued by 2 & 3 W. 4. c. 44; but see now 3 & 4 W. 4. c. 47. s. 3.

(b) The act in force in 1820, and still in force as to persons who petitioned for relief under it. See 7 G. 4. c. 57. s. 1.

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of the plaintiff did not prove the application of the act 1 G. 4. c. 119. to this case by legal evidence. The petition, discharge, and assignment took place under that act, so that when 7 G. 4. c. 75. passed the estate was out of *David Jones* the insolvent. Then a certified copy of the proceedings authorizing his discharge, though sealed with the seal of the insolvent court, since provided by 7 G. 4. c. 57. s. 3. was good evidence of them. For by s. 89 of that act, the records of the old become the records of the new court, so that they can only be proved as directed by the act establishing the latter. For s. 76 provides that a copy of such petition, schedule, order, and other orders and proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c. shall be admitted in evidence *without any proof further than that the same was sealed with the seal of the said court as aforesaid (a).*

Next, as to the demise by *John Jones*, it was objected that the plaintiff did not prove a sale by auction within two months, nor any notice of the sale in the *Gazette*, as required by 1 G. 4. c. 119. s. 7; but that section is only directory, *Doe v. Spencer (b)*, *Dance v. Wyatt (c)*, and does not prevent an estate from vesting in a purchaser from the provisional assignee. And in the absence of affirmative evidence that the act was not complied with, the construction in favour of the purchaser must be *omnia rité esse acta (d)*, so as to vest the legal estate in him, notwithstanding the assignee under the insolvent act might be liable to punishment for breach of trust in proceeding to sale without the preliminary notices required by law.

(a) *Vis.* as directed by sect. 3.

(b) 3 Bing. 203, 370.

(c) 6 Bing. 486.

(d) See *Cro. Eliz.* 400; *Bellamy's case*, 6 Co. 38, a.

But as the outstanding term was vested in *Phillips* by the deed dated 15th *December* 1830, he has the legal estate, and the verdict must therefore stand for the whole term on the demise by him. It is, however, contended that in 1818 the term was taken in execution under an *elegit*. Now an equitable interest in a term cannot be taken in execution, *Scott v. Scholey and Another, Sheriff of Middlesex* (a). In 2 Saund. 11 a. note *m*. it is said, on citing that case, that Lord *Ellenborough* there seems to have been of opinion that a trust estate for years cannot be taken in execution under stat. 29 C. 2. c. 3. s. 10. In giving judgment Lord *Ellenborough* said, "The very silence of that statute which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight in respect of executions, in which both freehold and leasehold trust interests equally stood before the passing of that statute." [*Bayley* B. There the original defendant *Coleman* had *had* a lease of the premises, but had assigned it, leaving nothing but a bare equitable interest remaining. You must contend that if, like *David Jones* in this case, a man be seised in fee of the inheritance subject to a term, he is not liable to be deprived of his fee by an *elegit* against him, for that the freehold is protected from seizure by the term outstanding in another, and the term by its being only an equitable interest. *Scott v. Scholey* differs from the present case in this, that *Coleman* the termor had assigned his lease, so that he only retained an equitable interest in the term for his benefit, but he had not the inheritance.]

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(a) 8 East, 466.

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It was held in *Doe v. Greenhill* (a) that the statute did not apply, as the term was held in trust for the defendant, not in trust for him solely, but for the defendant *and another*; and the same rule seems applicable to trusts of freehold. [Bayley B. Here *John Moses*, and afterwards *Thomas Jones* or *Moses* his son, was possessed of this term in trust for *David Jones*, the owner of the inheritance, and him only.] It is submitted he was a trustee for *Dance* the provisional assignee, if the estate passed to him in 1818, so that as an execution must be sued against the property a party has at the time of suing it out, and not against property which he has parted with long previously, the elegit in 1826 against *David Jones* could not reach the premises in question. [Bayley B. They say you never gave legal evidence that the property passed from *Dance* to *David Evans*, and that *David Evans* consequently never had it to part with.]

*E. V. Williams* in support of the rule. This declaration contains several demises, two relying on titles arising under insolvent proceedings, and a third on the trust estate assigned to *W. Phillips* for the residue of the outstanding term. But the plaintiff cannot recover under the first title, and on the latter a moiety at the utmost. First, he is not entitled under the insolvent proceedings, for the legal estate is either in the insolvent or the general assignee *David Evans*, who is not a lessor of the plaintiff. The insolvent having been discharged under 1 G. 4. c. 119. the proceedings should have been proved according to 1 G. 4. c. 119. s. 45. by which act a true copy of the petition, schedule, order, judgment, and other proceedings signed by the officer, is made the legal evidence of them; the act 7 G. 4.

(a) 4 B. & Ald. 684.

now in force, making proof of a legal assignment sufficient proof of the assignee's title, without more. *Delafield v. Freeman* (a) does not apply, so that the plaintiff, in order to found the assignment, should have proved a copy of each previous proceeding signed by the officer. [Bayley B. Office copies of the petition and discharge were proved, and an assignment signed by the insolvent, who had the reversion expectant on the term. That proof would suffice under 1 G. 4. c. 119. If your argument should prevail, the consequence would be, that unless 7 G. 4. applies to proceedings had under 1 G. 4. c. 119. the means of proving them given by that act will no longer exist, for the officer at present has no right to sign, but is to seal instead of signing as before; by a liberal construction "signature" may be satisfied by the sealing]. The only evidence at common law would be an examined copy or exemplification. The statute 1 G. 4. first substitutes an office copy authenticated by the officer's signature; and the latter act, 7 G. 4. c. 57. provides (s. 76.) that a copy of such petition, schedule, order, and other orders and proceedings *purporting* to be signed by the officer certifying the same to be a true copy, and sealed with the seal of the court, shall be received in evidence. Thus the latter act requires both signature and seal, though less positive proof of the former; but the old act is unrepealed as to proceedings commenced under it, which should therefore have been proved according to its provisions. [Bayley B. If the latter act repealed the whole of the former, you would say they should have gone a step further and proved the proceedings as at common law.]

The next question is, whether section 7 of 1 G. 4. c. 119. is not imperative that the real estate shall be sold by auction within two months, and that notice of

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(a) 6 Bing. 294.

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that sale should be given in order to a meeting of the creditors, or whether it is directory only. I say that, conferring as it does on creditors the important right of sale at their discretion, it is imperative, and therefore that the demise by *John Jones* is useless. [*Bayley B.* In the note to *Chitty's Statutes*, 596, it is said that the K. B. was of opinion that this clause was merely directory, and that the omission to convene a meeting was no bar to the assignee's action. If the legal estate once vested in *Dance*, what becomes of the elegit? In that view it is quite immaterial whether the sale was valid or not.] Still the demise by *John Jones* is bad, for the act of sale must be performed with the prescribed solemnities. In *Elliot v. Danby (a)*, and *Berry v. Bowes (b)*, arising under an early bankrupt act, sales before enrolment of the assignment to the lessor of the plaintiff were held bad, as without enrolment it was no sale. Yet the enrolment was not of the essence of the thing. [*Bayley B.* Those conveyances were not like that here executed by the provisional assignee to the purchaser, which is a common conveyance by lease and release. Here the assignees have the whole estate, and are not a mere conduit-pipe like commissioners. An improvident sale by assignees might be vacated in equity, and the creditors might apply to the insolvent court in consequence. In the absence of any proof to the contrary by the defendant, on whom that onus lies, it must be presumed omnia rité esse acta, and that the sale was by auction. The present is not to be construed like a power under which the estate of a third party is to be conveyed. It is not proved that the sale was not to have been by public auction]. As to the demise by *Phillips* resting on the trust estate assigned to him in the term, the insolvent is the

(a) 12 Mod. 3.

(b) Sir T. Jones, 196; 1 Ventris, 360.

*cestui que trust* of the term, and the defendants are therefore entitled to a moiety under the elegit. *Scott v. Scholey* goes on the ground of its being a mere resulting trust after payment of a debt. [*Bayley B.* The party there had an interest merely equitable; if the term could have been seized, the charge on the estate would have been superseded.]

*Cur. adv. vult.*

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The judgment of the court was afterwards delivered by

**BAYLEY B.**—This was an ejectment on the several demises of *William Phillips*, *John Jones*, and *Lewis Morris*. *Phillips* claimed the legal estate in the character of assignee of an outstanding term. *Jones* claimed as purchaser of the estate under the insolvent act. The application was to enter a nonsuit; but as to the demise by *Phillips*, the title of the plaintiff to recover a moiety is quite clear, and the only question is, whether he could defeat the defendant's title to the other moiety by the elegit of 1826, which turned on the question whether the evidence of insolvency was or was not sufficient? The history of the term was clearly traced from its creation in 1794 to *Phillips* the lessor of the plaintiff; but it turned out that there was an elegit in 1826 against *David Jones*, under which this term was seized, so that the plaintiff would be entitled to recover a moiety of the lands on the demise of *Phillips*. The other point was, whether there was sufficient evidence of the insolvency of *David Jones* and of the proceedings of the insolvent court. At the trial copies of the petition and of the different documents, including the assignment, were produced, authenticated by the seal of that court. That was argued not to be the legal evidence of those proceedings, and therefore, as *David Jones* appeared to be the owner of the

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inheritance in 1826, when the elegit was executed, a moiety might be seized in the trustee's hands under 29 C. 2. c. 3. s. 10. Were that so, the proper proof of the proceedings of the insolvent court was not given. It is said that it was not so given, because the office copies should have been shown to be signed by the officer pursuant to 1 G. 4. c. 119. s. 45. and not merely purport to be so signed and sealed with the seal of the court as directed by 7 G. 4. c. 45. Looking at those acts, however, as part of one system, it must be taken that the clause enacting what shall be evidence of the proceedings under the latter act shall be evidence to the same effect under the former. The statute 1 G. 4. constituted the insolvent court a court of record, and directed that every assignment should be entered on the proceedings of the court. Having next provided that an office copy shall be sufficient evidence thereof in all courts, it enacts, by s. 45, that a true copy of the petition, schedule, order, judgment, and other proceedings, signed by the officer in whose custody the same shall be, certifying it to be a true copy, shall be admitted in all courts as legal evidence of the same. Then by section 1 of 7 G. 4. c. 57. the powers given to the court established by 1 G. 4. are vested in the court continued by 7 G. 4. so far as they relate to the petitions of persons who had petitioned under that act, or to persons discharged under 53 G. 3. Thus statute 7 G. 4. did not create, but continued the court so established. By sect. 19. the conveyance to the assignee is to be filed of record, and a copy of the record, purporting to have the name of the provisional assignee indorsed thereon, and to be sealed with the seal of the court, shall be sufficient evidence in all courts of the assignment, and of the title of the provisional assignee. The additional provision by which the seal is introduced, probably makes the distinction between the



two acts. But as by section 89 of 7 G. 4. all the records then in the court are to remain in the custody of the officers of the said court then duly having the custody of the same respectively, and are to be deemed the records of the court continued thereby as aforesaid, it would be strange if different rules of evidence should prevail as to the sets of records before and after 7 G. 4. passed. Then by sect. 76 of the latter act, it is enacted, "that a copy of the petition, schedule, order, and other proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition &c. shall be admitted in evidence in all courts as sufficient evidence of the same, without any proof further than that the same is sealed with the seal of the court." Now the proceedings produced at the trial were proved conformably to that section; and there was proof dehors the instrument itself that the seal was that of the insolvent court. It "purported" to be signed by the officer, and certified the proceedings according to the act. Section 76 seems to me to supersede signing by sealing in the authentication of matters which are to be given in evidence. Under 29 C. 2. c. 3. the sealing of a will has been held to be substantially a signing, and the same principle may apply here. These office copies therefore being sealed by the officer, were properly received in evidence. If so, the title by elegit is repelled, and the whole premises are recoverable under the demise laid by *Phillips*. On the point whether the demise by *Jones* can be supported, a question arose as to the proving the plaintiff's compliance with certain formalities of sale prescribed by 1 G. 4. c. 119. s. 7. If that section is to be considered as imposing an absolute condition, then the performance of it by holding meetings of creditors, &c. should have been proved; if directory

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only, it need not. But it is a sufficient answer to say, that it is directory only. Were it to be held to make a condition precedent, it would be incumbent on a purchaser at any distance of time to prove that these directions were pursued. But even if they are not directory, another answer occurs. Four years have elapsed since the sale, without objection to it by any creditor, so that the proper presumption would be *omnia rité esse acta*. I am of opinion, therefore, that the plaintiff is entitled to a verdict on that demise, and that this rule must be discharged.

VAUGHAN B.—After a careful consideration of the clauses in the insolvent acts, I concur in the judgment that has been delivered. The question is, whether the proceedings in the insolvent court were duly proved or not? It was said that they were not so proved. Now 7 G. 4. c. 57. s. 1. enacts that the powers given to the insolvent court by 1 G. 4. c. 119. and other recited acts, shall be vested in the court to be continued by 7 G. 4. c. 57. as far as they relate to the petitions for relief dated previous to 26 May 1826, and that all things may be done relating to the matters of such petitions which such petitioners might have done had the recited acts been continued by that act. It is quite clear, on looking at the act 7 G. 4. that whilst it applies to all future petitions, and continues the former act as to petitions and things done under it, it was never intended to continue the evidence clause in 1 G. 4. c. 119. after the passing of 7 G. 4. c. 57. Great inconvenience had been found to result from bringing down the officer himself to the trial to prove the signature, as made requisite by 1 G. 4. c. 119. and it was found advisable to substitute sealing for signature; but whether sealing amounts to signature or not, I am of opinion that the section 76. in the latter act, relating

to evidence, is substituted for that in the former act, so that though the 1 G. 4. c. 119. remains in force as to the petitions, yet copies of the proceedings, purporting to be signed by the officer in whose custody they are, certifying the same to be true and sealed with the seal of the court, are sufficient evidence of proceedings had under 1 G. 4. c. 119. I am also of opinion that 1 G. 4. c. 119. s. 7. is directory and not imperative, and that the onus lay on the defendants to prove that its provisions had not been complied with.

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GURNEY B.—I concur on both points. *Doe d. Spencer v. Clark* (a) shows that an enactment making it lawful for the provisional assignee to sue in his own name is merely affirmative of his right to sue, and that it is not necessary for him to show the authority of the insolvent court so to sue. The clauses alluded to show not only that the evidence given was proper, but was the only evidence which could be given. By 1 G. 4. c. 119. the court is created, and an assignment is directed to be entered on its proceedings, of which an office copy is to be evidence. Then section 45. directs that copies of the proceedings, signed by the officer having them in custody, shall be evidence thereof in all courts. Stat. 7 G. 4. has for its object the continuing the court with enlarged powers. By s. 1. it continues all its powers in subsisting cases, as far as they relate to petitions and proceedings thereon, and then repeals the previous act. Had the provisions rested there, the argument for the defendants would have had weight; but taking the 3d, 76th, and 89th sections together, the intention appears clear that the evidence as to past and future insolvent proceedings should be what was here given. For section 3. pro-

(a) 3 Bing. 370.

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vides that the court shall have a seal, and shall cause to be sealed all such records, &c. as were thereby required to be sealed, and such other records as the court shall require. Then by sect. 89. all records then in the court are to be deemed the records of the court so continued, so that the records of the old became records of the new court. Then sect. 76. declares what evidence may be given of the records of the new court, and, as it seems to me, concludes the question by providing that copies under the seal of the court shall be sufficient evidence thereof without further proof than that they are so sealed. That evidence having been here given the proceedings were properly proved.

Rule discharged.

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### LINLEY and Eight Others *against* CLARKSON.

Several persons signed an agreement to pay their proportions of costs incurred in defending particulars rateably, according to the sums subscribed by each, and set opposite their respective names. The words of the agreement

when counted with each sum and signature, as far as, and including that of the defendant, amounted to less than 1080 words. The result was similar on counting the words of the agreement with the signatures, but without the sums. But on adding *all* the sums and all the signatures to the words in the body of the agreement, it proved to contain more than 1080 words. Held, that it being necessary to read every sum and signature, in order to ascertain the proportion payable by each subscriber, a 1l. 15s. stamp was necessary.

**A**SSUMPSIT on an agreement to receive contributions for a share of the expenses of resisting a suit commenced in the duchy court of *Lancaster* by the owners and occupiers of *Wakefield* soke mills against four individuals (not including the defendant) for alleged violation of the soke to those mills. The plaintiffs were the nine surviving members of thirteen committee men named in the agreement, and defendant was one of the subscribers to the defence of the suit. The declaration stated that two of the thirteen committee men had died before the suit commenced. The

agreement reciting that the owners of the *Wakefield* soke mills with their lessees were about to institute proceedings against some one or more of the resiants, tenants, or inhabitants of and within the township of *Alverthorp-with-Thornes*, in the county of *York*, for having in his or their possession, and making use of one or more mill or mills, engine or engines, for the purpose of grinding corn, grain, and malt used and consumed in their dwelling-houses, or for having used and consumed in their said dwelling-houses, corn, grain, or malt not ground at the said soke mills; and that the resiants, tenants, and inhabitants of and within the said township of *A. T.* are not bound to carry their corn, grain, and malt to the said soke mills, and that they the said resiants, tenants, and inhabitants have a right to keep in their possession and make use of any engine or mill for the purpose of grinding corn, grain, and malt, for sale or otherwise, to be used or consumed in their respective dwelling-houses,—the subscribers being severally inhabitants, resiants, or owners of estates of and within the township aforesaid, in order to resist the claim of the said owners and lessees, thereby nominated and appointed the plaintiff and twelve others to be a committee to defend, conduct, and manage any suit &c. that should be brought by the said owners or lessees of the said soke within ten years, for any of the causes abovementioned, and did thereby for themselves severally and respectively, and for their several and respective executors &c. promise and agree to and with the said defendant (and others), their executors and administrators, that they and each of them, and their and each of their several and respective heirs, executors, &c. should and would from time to time, when thereunto requested by the said defendant and others, pay to them on demand their several and respective shares, parts, and proportions of all bills, for

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fees, costs, charges, damages and expenses whatsoever, which should or might be by them incurred, or which they might sustain, bear, expend, or be put unto, for or on account of defending and conducting any such suit or suits as aforesaid, or for or on account of any matter, cause, or thing relative thereto, until the final determination thereof, rateably and proportionably, according to the sums of money severally subscribed by them and set opposite to their respective names; and they did thereby authorize and empower the said committee, or the major part of them, to demand, collect, sue for, and receive the same accordingly.


Nearly 200 persons signed this agreement, setting different sums in figures opposite their names. It bore a 1*l.* stamp, and, after counting in the signatures and sums, contained more than 1080 words.

At the trial before *J. Parke J.* at the last *Yorkshire* assizes, it was objected for the defendant, that by stat. 55 G. 3. c. 184, Schedule Part I. tit. *Agreement*, the agreement sued on should have borne a 1*l.* 15*s.* and not a 1*l.* stamp. The plaintiff had a verdict, subject to leave to move on this among other points not afterwards discussed.

*Jones Serjt.* having obtained a rule for entering a nonsuit,

*F. Pollock, Alexander and Wightman* showed cause. Agreements not containing more than 1080 words, (*viz.* fifteen common law folios,) require a 1*l.* stamp, while those containing more than that quantity require a 1*l.* 15*s.* stamp. Then the signatures and sums, if counted at all, ought to be counted only as far as the defendant's signature and the sum opposite to it, which would be less than 1080 words. For it was not requisite to the validity of the agreement as against the

present defendant, at the time he signed it, that any signature should be afterwards added. *Bayley B.* Must not the account of the proportions to be paid by the persons contributing be taken by first ascertaining the total number of signatures? ] If the agreement was valid within the stamp act at any time, for instance, at the time it was signed, how can it become invalid by any subsequent act? [*Bayley B.* In order to see what was the ultimate liability of each party, it was necessary to look to all the sums and names.] No other signature besides the defendant's was proved at the trial. The plaintiff had recognized the agreement by making payments under it.

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**BAYLEY B.**—The question is, whether the agreement as stamped can be read in evidence in a court of law. That question is not affected by any act of the plaintiff in compliance with the agreement. How, without proving the other signatures, could the plaintiff tell the proportion the defendant ought to contribute, or show that he or the other subscribers did not contribute their fair shares? The agreement only made each subscriber liable to pay an aliquot proportion of the whole: how then can the plaintiff ascertain the sum due by the defendant without reading the whole instrument, as well as every sum and signature anterior or subsequent to that of the defendant? As every signature after that of the defendant altered the extent of his liability, all were essential, and none could be excluded from consideration.

The rest of the court concurred.

Rule absolute (a).

(a) See *Wickens v. Evans*, 4 C. & P. 359; *Dudley v. Robins*, 3 id. 26.

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BLOWER *against* HOLLIS.

In an action on the case for escape from custody on an attachment for non-payment of costs, pursuant to a decree in equity, a count alleging the suit "to have been commenced and pending," is supported by proof of the order for the attachment, the certificate of the master's taxation, and of the decree itself.

*Seemle*, that a decree in equity is admissible in evidence without reciting the previous proceedings therein, or proving them, where the object of its production is to prove the existence of the decree, and not any facts previously in issue in the suit.

*Quere*, if debt lies for an escape from custody under an attachment for non-payment of costs, pursuant to a decree in equity.

**C**ASE against a sheriff for escape. The declaration stated, that before the committing of the grievances &c., to wit, on &c. a certain decree was made and pronounced in and by his majesty's court of Exchequer at *Westminster*, to wit, at &c. in and concerning a certain suit or action then depending in the same court, wherein one *E. T.* was the complainant, and *W. B.* the now plaintiff was defendant, by which said decree it was among other things ordered, that the bill of the said *E. T.*, so far as it sought an account of certain tithes therein mentioned, should be dismissed out of the said court with costs, and that it should be referred to *R. R.* esq. a master of the said court, to tax the then defendant his costs of the said suit; and that by the certificate of the said master, made and given in pursuance of the said decree, it was certified that he the said master had considered the said bill of costs so referred to him by the said decree, and had taxed the same at 381*l.* 4*s.*; that thereupon, to wit, on &c. his majesty's writ of subpœna was duly issued out of the said court against the said *E. T.* commanding payment of the said sum of 341*l.* 4*s.* so allowed to the said *W. B.* by the said court for his said costs, which said writ was then and there duly served upon the said *E. T.* and payment of the said costs was then and there duly demanded, but that the said *E. T.* did not when the same were so demanded, or at any time afterwards, pay the same; that thereupon the said plaintiff prayed the said court that his majesty's writ of attachment might be issued against the said *E. T.* for his contempt in not paying the said costs so taxed and demanded as aforesaid, and that afterwards, to wit, on &c. by a certain



order then and there duly made by the same court, in the same suit, it was ordered that an attachment should be issued out under the seal of the said court against the said *E. T.* for his contempt in not paying the said costs; that in pursuance of the said order the said plaintiff for the recovery of his said costs, to wit, on &c. sued and prosecuted out of the said court a certain writ of attachment directed to the said defendant, stating the writ, and that it was indorsed as having been issued against the defendant at the instance of the plaintiff for non-payment of the said sum of 381*l.* taxed costs, in a cause entitled *Thomas v. Blower*. The declaration then stated the delivery of the writ to the sheriff, the arrest, and the escape.

The second count was like the first, except that before stating the application for an attachment, it alleged that before the committing of the grievances &c., to wit, on &c. a certain other suit or cause had been and was pending in his said majesty's court of Exchequer, between the said *E. T.* and the said plaintiff. Plea, not guilty.

At the trial at *Monmouth* before *Gurney B.* examined copies of the decree and the master's certificate of 381*l.* 4*s.* costs were put in and proved by the plaintiff. He next proved the subpoena requiring *Thomas* to pay the costs, a demand and refusal of them, the order for and issue of an attachment for non-payment, the delivery of it to the defendant, the arrest of *E. T.* and his escape. The defendant objected, first, that the decree could not be evidence without proof of the bill and answer; secondly, that the plaintiff had failed to prove the allegation in the second count, that a suit had been and was depending between *E. T.* and the plaintiff. The plaintiff had a verdict for 200*l.* damages. Leave being given to the defendant to move to enter a nonsuit, the *Solicitor-General* (Sir John Campbell)

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obtained a rule accordingly, and for a new trial, on the ground of excessive damages.

*Maule* and *R. C. Nicholl* showed cause. First, the examined copy of the decree was admissible in evidence without producing the bill and answer. [*Bayley* B. You do not want the decree to establish a fact, but to prove that the bill was dismissed with costs.] There was no omission to prove any material averment in the declaration, nor any defect of proof by the plaintiff, but it was objected barely and on the abstract that the decree was not evidence, without also putting in the bill and answer. Now in order to give in evidence in a court of law depositions taken in equity, a very different course is requisite from that where it is desired to prove a decree, which is the judicial act of the court. For depositions cannot be read in evidence till some matter is shown to have existed, upon which they would be material in evidence between the parties. Till that is shown by proving the bill and answer they may be quite extra-judicial; *Trowel v. Castle* (a) to the contrary is a confused note. The dictum of *Twisden J.* in *Wheeler v. Lowth* (b) that if the bill and answer be recited a decree is sufficient, seems quite extra-judicial. Nor is it clear whether the dictum is meant as establishing its admissibility in evidence, or as proving the facts which were to be authenticated between those parties. [*Bayley* B. It is probable that in *Trowel v. Castle* the decree was produced to prove the point in issue in the preceding cause, viz. the existence of a custom. If so, the bill might there be required to prove what issue had been raised on it.] In *Lord Thanet v. Patterson* (c) it is said, that if a

(a) 1 Keble, 21 E. T. 13 C. 1.

(b) Com. Dig. Evidence (C. 1); Bull. N. P. 253, b. n.

(c) Bull. N. P. 135; K. B. E. T. 12 G. 2.

party wants to avail himself of the decree only, and not of the answer or depositions, the decree, being under the seal of the court and inrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show that the point in issue there was not *ad idem* with the present issue. [*Bayley B.* It is quite immaterial here whether the suit was for tithes or not; then the bill and answer are quite immaterial.] In *Jones v. Randall* (a) the issue being whether a decree would be reversed, it came in question whether the decree could be given in evidence, and it was held, that upon that issue proof of the decree and reversal only was sufficient. The sentence of a foreign prize court has been admitted in evidence without proof of libel and answer; *Dalglish v. Hodgson* (b). [*Bayley B.* If a sentence is adduced merely to prove the fact that it exists, it is sufficient without other evidence. Thus the condemnation of a ship is proved by producing the sentence of an admiralty court to that effect; but if it is requisite to prove a fact in issue before any such court, the decree would not be sufficient evidence of that fact without proof of the libel and answer.] Probates of wills are received in evidence without proving previous proceedings on application by the party propounding the will. Sentences in ecclesiastical and admiralty courts are given in evidence in a similar manner (c).

Secondly, *Jones v. Randall* shows that the allegation that a suit was pending is proved by producing the decree therein, which could only be made in a suit. But it is also proved by the order for the attachment and the issuing the writ thereon, without the aid of the decree, for such a writ cannot be presumed to have issued, unless a suit had been pending, *Nightingale v.*

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(a) Cowp. 7.

(b) 7 Bing. 495.

(c) See cases collected, Buller's N. P. 7 ed. 244. n. n.

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*Wilcoxon* (a). The bill and answer are the best evidence of their own contents proving the nature of the suit, but do not show the additional fact of the pendency of a suit, which was the point to be proved in this case, *Rex v. Holy Trinity* (b), *Alderson and Another v. Clay* (c).

Thirdly, the allegations in the declaration, that a suit had been pending and a decree made, are immaterial, and might be safely struck out of the declaration; they therefore did not require proof, *Stoddart v. Palmer* (d); for had an attachment issued without either, the sheriff was not liable to the defendant for false imprisonment, being bound to execute process directed to him, though improperly issued; *Weaver v. Clifford* (e), *Burton v. Eyre* (f), *Gold v. Strobe* (g). He would therefore be liable for an escape. The only proceeding necessary to state in the declaration was, the order for the attachment, that being the act of the court. The master's certificate of costs and the order for the attachment were proved by the plaintiff. Nor can the grounds be inquired into on which the judgment of a superior court is founded, *Walker v. Witter* (h), *Bromfield v. Jones* (i).

On the point urged for a new trial nothing shows the damages to be excessive. An attachment for non-payment of costs is in the nature of an execution, *Phelips v. Barrett* (k), so as to entitle a party in custody under it to be discharged under the Lords' Act, which only applies to prisoners in execution, *Rex v. Stokes* (l). The plaintiff's costs had been ascertained by the master's

(a) 10 B. &amp; Cr. 215.

(b) 7 B. &amp; Cr. 611.

(c) 1 Stark, N. P. C. 405; see also *Bucher v. Jarrett*, 3 B. & P. 143.

(d) 3 Bar. &amp; Cr. 2.

(e) Cro. Jac. 3.

(f) Id. 288.

(g) Carthew, 148.

(h) Doug. 1.

(i) 4 B. &amp; C. 480.

(k) 4 Price, 23; but see *Lewis v. Morland*, 2 B. & Ald. 56, 63.

(l) Cowper, 136.

certificate to be 381*l.* 4*s.*, and *Thomas* being taken on final process, the plaintiff, by losing his body, lost his security for that sum. This case is very different from an escape on mesne process, where, as it is not ascertained whether any thing is due to the plaintiff or that he would have recovered against the party who has escaped, the damages are frequently though not necessarily nominal. But the verdict is for 200*l.* only, though had he sued in debt, as in *Lewis v. Morland* (a), he would have recovered the whole sum, and the rights of the parties remain the same, notwithstanding the difference of forms of action, *Bonafons v. Walker* (b). [Bayley B. The action of debt is provided by stat. 1 R. 2. c. 12. in the case of an escape from custody under a *ca. sa.* In *Lewis v. Morland* it was not necessary to raise the objection that debt would not lie on an attachment for non-payment of costs, but doubtless it would otherwise have been taken, and most probably with success.] If it is said that the plaintiff may recover his costs by issuing fresh processes for them, that would be equally so if the escape were under a *ca. sa.* yet the plaintiff might then recover his whole debt from the sheriff.

*Talfourd* (the *Solicitor-General* with him) in support of the rule. The decree was not admissible in evidence, for it does not even recite the bill and answer. The decision in *Wheeler v. Lowth* (c) therefore does not apply, and that in 1st *Keble* against the admission does. No case has decided that a decree in Chancery, which does not notice the previous proceedings, will, standing alone, be admissible in evidence. Here the decree does not recite the bill and answer, so that *Wheeler v. Lowth* does not apply, and *Trowel v. Castle* (d) does. No analogy exists between a decree

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(a) 2 B. &amp; Ald. 56.

(b) 2 T. R. 126.

(c) Com. Dig. Evidence, (C. 1.)

(d) 1 Keble, 21.

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and a judgment at law, part of which is formed of the pleadings and verdict. [*Bayley* B. The second count does not state a decree, therefore the plaintiff would retain his verdict on that.] It is another question whether if the decree is admissible at all, it is evidence of a suit pending. [*Bayley* B. It must be taken that the court would not have granted the order for an attachment unless a suit had been pending.] *Trowel v. Castle* is thus stated in *Buller's Nisi Prius*, 244, "A decretal order in paper with proof of the bill and answer (or if they are recited in the order) may be read." That agrees with *Wheeler v. Lowth*. The damages are excessive, because if there had been no escape by *Thomas*, it appeared that he had not property to answer the plaintiff's demand; and if he had, a fresh execution might have gone for the costs.

BAYLEY B.—I am of opinion that the proof of the order for an attachment for non-payment of costs is of itself evidence in support of the allegation in the second count, that a suit had been pending; and it is sufficient if either of the counts can be sustained. It is, therefore, unnecessary to decide whether the decree was admissible in evidence without recital of the bill and answer, or without proof of them; but that latter question depends on the purpose for which the decree is produced in evidence. If the object be to show what facts were in issue in the suit, or to use the contents of a decree, the bill and answer must be produced; whereas if the fact to be shown was merely that a decree has been made or reversed on appeal, proof of the previous proceedings would not be necessary (a).

(a) 1 Phillpotts on Evidence, ch. 5. The learned baron then recommended the defendant to consider an offer of plaintiff respecting the damages. The offer was finally rejected.

I do not think that debt would lie for an escape like the present, and if that action cannot be brought within the statute, it is impossible to contend that it would lie at common law.

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VAUGHAN B.—I perfectly concur. It was here perfectly immaterial to the plaintiff's case what the bill or answer contained. As to the supposed excess of damages for this escape, taking the attachment as mesne process, juries frequently give the whole amount in actions for escape on that process.

BOLLAND and GURNEY Bs.—concurred.

Rule discharged.

*Ess against JOHN SMITH and JOSEPH SMITH, Prisoners.*  
*SAME against SAME.*

**A**RCHBOLD moved for a habeas corpus ad respondendum to bring up *John Smith*, one of the defendants, in order to charge him with a declaration, on affidavit that he had been arrested on a capias in two actions, and was in the custody of the marshal of the King's Bench, under a judge's warrant. The plaintiff's object was to prevent him from being superseded, and to detain him under the uniformity of process act, 2 W. 4. c. 39. s. 8. He urged that no change of custody whatever would take place for a moment, as might have happened had he been brought up to render in discharge of his bail.

A prisoner in the criminal custody of the marshal of the K. B. may be brought up by habeas corpus under 2 W. 4. c. 39. s. 8. in order to detain and charge him with a declaration.

A writ was granted to bring him up in custody of the marshal to be charged with the declaration, which was accordingly done.

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PARKES *against* EDGE.

In a declaration by an indorsee against an indorser of a bill accepted payable at a particular place, it is sufficient to allege in the declaration a presentment to the drawer, without stating any acceptance, and to prove a presentment at the particular place, and refusal of payment there.

The declaration stated the drawer to have drawn the bill payable to his order, and to have indorsed the bill to the defendant, and the defendant to the plaintiff; whereas it was in fact made payable to the order of the defendant, the payee, who indorsed to the plaintiff.

*Semle*, that the judge exercised a right discretion in allowing the record to be amended under 9 G. 4. c. 15.; but *quære*, if the court in banc have power to revise the judge's exercise of that discretion?

**A**SSUMPSIT by the indorsee against the indorser of the following bill of exchange:—

“ £59 : 10s. 1d.

*London, March 25, 1828.*

Thirty months after date pay to the order of Mr. *Thomas Edge* fifty-nine pounds ten shillings and a penny, value received.

*Samuel Southgate.*

To Mr. *John Harvard, &c.*

Accepted,  
Payable at 8, *Cloak Lane*,  
*Cheapside*,

Indorsed,  
*Thomas Edge.*  
*Henry Parkes.*

*John Harvard."*

The declaration stated the bill to be drawn by *Southgate* on *Harvard*, requiring him to pay to his order 59*l.* 10*s.* 1*d.* thirty months after the date thereof, and that *Southgate* then and there indorsed the bill to the defendant, and the defendant to the plaintiff, and that *Harvard* did not pay the bill, though presented to him on the day it became due, of which defendant had notice.

At the trial at the *Guildhall* sittings after last term, before *Bolland B.*, the bill having been produced and the hand-writing proved, *Jervis* contended that the plaintiff should be nonsuited for the variance; but the learned baron allowed an amendment to be made under 9 G. 4. c. 15. It having been afterwards urged for the defendant that the declaration should have stated that the bill was presented at the particular place fixed for its payment by the acceptance, proof was given of the presentment at 8, *Cloak Lane*, and of the notice to the defendant of the dishonour there. The former objection was repeated, and it was added, that a count stating a mere general presentment to the



drawer, without stating an acceptance, could not be sustained. The plaintiff had a verdict, with leave to move to enter a nonsuit on both points.

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*J. Jervis* moved accordingly. First, the amendment made under 9 G. 4. c. 15. was improperly allowed, the variance being one of substance, in alleging the bill to be payable to the order of the drawer instead of the payee *Thomas Edge*, so that the real cause of action did not appear on the face of the declaration. Lord *Tenterden*, in *Whitehead v. Scott (a)*, expressed his opinion against an amendment of a record where there appeared to be gross negligence; saying, that it was the duty of a judge to take care that business should be conducted with ordinary care, and that laxity in allowing amendments had, in his opinion, done more harm than good. In *Jelf v. Oriel (b)* the same learned judge, declaring the blunder to be one which no man could make who could use his eyesight, stated the object of the act 9 G. 4. to be to prevent a failure of justice from accidental errors; and again expressed his opinion that the strict rules had been too much departed from in order to attain justice in particular cases, which had introduced too great laxity into practice. [*Bayley B.* The mistake in *Jelf v. Oriel* was the stating an alternative acceptance at one place or the other, which they desired to amend by making the acceptance absolute. The mistake here was verbal.] In *Webb v. Hill (c)* Lord *Tenterden* had previously said "This is nothing like a mere mistake in setting out a written instrument; it is the allegation of matter totally different from that offered in evidence." Here the proof differs from the averment in a substantial part. [*Bayley B.* That difference must exist whenever a variance requires amend-

(a) 2 Moody &amp; M. 137, n.

(b) 4 C. &amp; P. 22.

(c) 1 Moody &amp; M. 255.

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ment. Defendant must have known whether he indorsed more than one bill of that date and sum.] 2dly. The declaration does not aver, according to the fact, that the bill was accepted payable at No. 8, *Cloak Lane, Cheapside*, or that any presentment was made there. Then the defendant cannot be charged as indorser. [*Bayley* B. A general presentment to the acceptor was here alleged, and presentment at the place fixed by his acceptance was proved; then, as in ordinary actions, neither acceptance nor the place at which the presentment was made need be averred, but it is sufficient to state presentment to *J. S.*; it was here sufficient to prove such a presentment as the actual acceptance required (a), followed by refusal.] *Gibb v. Mather* (b) was an action by the indorsee against the drawers of a bill accepted at Messrs. *Jones, Loyd & Co.* bankers, *London*. At the trial a nonsuit was pressed for, on the ground that presentment of the bill at *Jones, Loyd & Co.* was necessary to be proved as against the drawers. The objection being overruled, a bill of exceptions was tendered, which was afterwards argued in error in the Exchequer Chamber; which court held, that notwithstanding 1 & 2 G. 4. c. 78. s. 1. a presentment of the bill at the bankers must be proved to charge the drawer, *Tindal* C. J. saying (c), "that the doubt which had been formed," (*viz.* whether in case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration and proving at the trial presentment for payment at the place where the drawee had by his acceptance made the bill payable,) "was confined to the case where the question arose between

(a) *Jones v. Morgan and Another*, 2 Camp. 474. *Bayley on Bills*, 4th ed. 317, n. See *Tanner v. Bean*, 4 B. & Cr. 312.

(b) 2 Tyr. R. 189.

(c) *Ibid.* 197, 198.

the holder and the acceptor. In cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable on the dishonour of the bill by the acceptor." [Bayley B. In that case the declaration alleged an acceptance making the bill payable at a particular place, and the plaintiff was therefore bound to prove a presentment there, and failed to do so. Here no such allegation is made, but all the necessary proof was given, *viz.* presentment at 8, *Cloak Lane.*] As against the indorser this is a special acceptance; presentment at the particular place should therefore have been alleged as well as proved.

BAYLEY B.—The statute 9 G. 4. c. 15. (a) enacts, "that it shall be lawful for any judge sitting at nisi prius &c., if he shall see fit so to do, to cause the record on which any trial shall be pending before him in any civil action &c., when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof on the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge shall think reasonable." Thus that act gives a discretionary power to the judge at nisi prius. Here the action is brought on a bill of exchange payable to the order of *Edge*, and indorsed to the plaintiff by the defendant. It is misdescribed in the declaration as a bill payable to the order of *Southgate*, and by him indorsed to *Edge*. Still *Edge* is in point

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(a) See a more comprehensive provision, 3 & 4 W. 4. c. 42. s. 23., in force since 1 June 1833.

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of fact the person who indorses some bill to this plaintiff, and the tenor of that bill is described in the declaration. The question is, whether the judge exercised a sound discretion in directing an amendment, so as to make the record consistent with the justice of the case. I entertain great doubt whether it is not a matter exclusively for his discretion, and at present I think that this court is not competent to review his exercise of that discretion. Assuming for the present that it is so competent, I think that the discretion possessed by the judge was here rightly exercised. There is no doubt that a bill of exchange exists, corresponding in date, amount, and in the names of the indorser and drawer, which was indorsed by *Edge* to the plaintiff. The evidence is, that such a bill was indorsed by the present defendant to the plaintiff. If the present defendant could have shewn that there were two bills corresponding in all the above particulars, and both indorsed to the defendant, I should have said, had the case occurred before me, this being a case where two bills were indorsed by the defendant to the plaintiff, I must assume that the bill declared on is the other bill, and should have refused the amendment; but where, as in this case, there is no suggestion of the existence of any other bill, but a mere mistake has been made not interfering with the justice of the case, I think that a sound discretion was exercised in allowing the amendment. *Jelf v. Oriel*, as a decision of Lord *Tenterden*, though at nisi prius only, is deserving of high respect. But it differed much from this case. That declaration described the bill as accepted, payable at Sir *J. Esdaile's* & Co. bankers, *London*, or at No. 18, *Poland Street, Oxford Street*; whereas the latter place of payment had been added by some person not being the acceptor, and subsequently to the genuine acceptance at Sir *J. Esdaile's*. As that alteration might have been made

the subject of a criminal prosecution, I cannot say that in such a case the judge did wrong in refusing the amendment prayed.

The other point urged was, that the plaintiff was bound to allege in his declaration a presentment at the particular place at which the bill was accepted payable. But the acceptance, whether general or at a particular place, need not be stated on the record against any party but the acceptor (a); then if you prove such a presentment as the acceptance may make necessary, that is all which is required to entitle you to recover against the drawer or indorser; for as the acceptance need not be stated at all, the plaintiff, who declares accordingly without stating it, cannot be bound to state the presentment it requires. It then becomes merely matter of evidence, and proof of presentment at the particular place at which the acceptor makes it payable, supports the general presentment laid in the declaration. I am therefore of opinion, on both points, that this rule ought to be refused.

VAUGHAN B.—I concur in opinion on both points. I think that the allowance or refusal of amendment is a question purely for the discretion of the judge, and that it has in this instance been properly exercised by him, under the very salutary act for that purpose. I give no opinion as to the power of this court to revise that exercise of discretion.

BOLLAND B.—I continue in my original opinion. *Jelf v. Oriel* has been distinguished from this case. It not having been suggested that any other corresponding bill existed, I thought that justice was forwarded by permitting the amendment. On the other point, it was

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(a) *Jones v. Morgan*, 2 Camp. 474. Bayley on Bills, 4th ed. 317, n. See *Tanner v. Bean*, 4 B. & Cr. 312.

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not necessary to allege in the declaration that the bill was accepted payable at 8, *Cloak Lane*. It was proved to be presented at the place where it was specially made payable.

GURNEY B. concurred.

Rule refused.

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For drawer, in line 13 of the marginal note of this case in p. 364, read drawer.

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In an action by an indorsee against the drawer of a bill accepted by T. and G. at a London bankers, the declaration did not state the acceptance at all, but stated that it was presented to T. and G. (the drawees) for payment, and that they refused to pay. The proof was presentment of the bill at maturity at the clearing-house to the clerk of the London bankers named in the acceptance. Held, that as the declaration did not state the acceptance, the presentment at the place fixed by the acceptors was sufficiently proved, and that the London bankers were agents for that purpose to the acceptors.

HARRIS and Another v. PACKER. Cor. PARKE J. *Berks* Lent Assizes, 1833.—Assumpsit by indorsee against the drawer of the following bill:  
*Newbury, May 28, 1831.*

£275 0 0

N. E.

Three months after date pay to my order the sum of £275 for value received in malt

*John Packer.*

To Messrs. Tomkins and Goslin,  
Malt-factors, Upper Thames Street,  
London.

Indorsed *John Packer.*

Accepted, payable at *Ladbroke's & Co.*  
~~*Tomkins and Goslin.*~~

Cancelled by mistake, *P. Kennedy.*

The declaration stated that defendant drew the bill and directed it to *Tomkins and Goslin*, requiring them to pay to the defendant's order 275l. three months after the date thereof, (without then adding "which period has now elapsed," according to the direction annexed to *Reg. Gen. Trinity* term 1 W. 4;) but stated the indorsement of the bill by the defendant to the plaintiffs, that it was then and there presented to Messrs. T. and G. for payment, that the said Messrs. T. and G. then and there refused to pay the same, and that the defendant had notice of the premises.

The bill having been accepted by T. and G., payable at *Ladbroke's* and Co., was afterwards discounted by the plaintiffs, who were bankers at *Reading*. Their London agents presented it to *Ladbroke & Co.* at the clearing-house on the morning of the day it became due; when brought from the clearing-house to *Ladbroke's*, their clerk *P. Kennedy* proved that he at first cancelled the acceptance, treating the bill as good, but that after looking at T. and G.'s account he wrote on it "cancelled by mistake" and "N E." for "no effects," and the bill was returned.

For the defendant it was objected, that the only presentment alleged was presentment to T. and G., and that no presentment was averred to have

been made at *Ladbroke's*, the place where it was made payable, or "according to the tenor and effect of the bill and of the said T. and G.'s acceptance," *Huffam v. Ellis*, Dom. Proc. M. 31 G. 3. 3 Taunt. R. 415; and next, that no presentment at *Ladbroke's* was proved.

For the plaintiffs it was answered, 1st, that the acceptance by T. and G. made no part of the declaration; and 2d, *Reynolds v. Chetile*, 2 Camp. R. 595. was cited to show that a presentment of a bill accepted payable at a London bankers to their clerk at the clearing-house, is a presentment at that banker's. Besides, as this bill was discounted by the plaintiffs with T. and G.'s acceptance on it, the presentment proved was sufficient as between the plaintiffs as indorsees and the defendant the drawer.

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PARKE J.—First, as to the declaration, the plaintiff has not averred that the bill was accepted by T. and G. payable at *Ladbroke's & Co.*, or that it was accepted by T. and G. at all. Then as to the evidence, the bill is shown to have been presented at the place where T. and G., the acceptors, made it payable, and Messrs. *Ladbroke's* were agents to the acceptors for that purpose. The plaintiffs have proved the cancellation to have been such as would not amount to a discharge of the bill.

Verdict for plaintiffs—Execution in a month.

*Telfourd Serjt.* and *Tyrrhitt* for plaintiffs. *Ludlow Serjt.* for defendant.

See *Macintosh v. Hayden*, Ry. & M. 362.

### DONALDSON *against* WILLIAMS.

**T**RESPASS for assault and false imprisonment, and for compelling plaintiff to go along public streets to a police office, and then and there imprisoning and detaining him. Pleas, not guilty: and 2dly, that the plaintiff, before the said time when &c. in the first count mentioned, to wit, on &c., was a weekly hired servant of the defendant and one *A. Whyte*, and employed by them as such weekly servant in their joint trade and business of hatters, which was then and continually afterwards, and at the said time when &c., carried on in the said dwelling-house in the said first

One of two joint tenants of a house where the partnership business is carried on, may authorize a servant of the partnership to remain on the premises, though the other has given him notice to leave the service.

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v.  
EDGE.

not necessary to allege in the declaration that the bill was accepted payable at 8, *Cloak Lane*. It was proved to be presented at the place where it was specially made payable.

GURNEY B. concurred.

Rule refused.

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London.

Indorsed John Packer.

Accepted, payable at ~~Ladbroke's & Co.~~  
~~Tomkins and Goslin.~~

Cancelled by mistake, P. Kennedy.

The declaration stated that defendant drew the bill and directed it to Tomkins and Goslin, requiring them to pay to the defendant's order £275l. three months after the date thereof, (without then adding "which period has now elapsed," according to the direction annexed to *Reg. Gen. Trinity term 1 W. 4*;) but stated the indorsement of the bill by the defendant to the plaintiffs, that it was then and there presented to Messrs. T. and G. for payment, that the said Messrs. T. and G. then and there refused to pay the same, and that the defendant had notice of the premises.

The bill having been accepted by T. and G., payable at *Ladbroke's and Co.*, was afterwards discounted by the plaintiffs, who were bankers at *Reading*. Their London agents presented it to *Ladbroke & Co.* at the clearing-house on the morning of the day it became due; when brought from the clearing-house to *Ladbroke's*, their clerk P. Kennedy proved that he at first cancelled the acceptance, treating the bill as good, but that after looking at T. and G.'s account he wrote on it "cancelled by mistake" and "N E." for "no effects," and the bill was returned.

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been made at *Ladbroke's*, the place where it was made payable, or "according to the tenor and effect of the bill and of the said T. and G.'s acceptance," *Huffam v. Ellis*, Dom. Proc. M. 51 G. 3, 3 Taunt. R. 415; and next, that no presentment at *Ladbroke's* was proved.

For the plaintiffs it was answered, 1st, that the acceptance by T. and G. made no part of the declaration; and 2d, *Reynolds v. Chettle*, 2 Camp. R. 595. was cited to show that a presentment of a bill accepted payable at a *London* bankers to their clerk at the clearing-house, is a presentment at that banker's. Besides, as this bill was discounted by the plaintiffs with T. and G.'s acceptance on it, the presentment proved was sufficient as between the plaintiffs as indorsees and the defendant the drawer.

PARKER J.—First, as to the declaration, the plaintiff has not averred that the bill was accepted by T. and G. payable at *Ladbroke's & Co.*, or that it was accepted by T. and G. at all. Then as to the evidence, the bill is shown to have been presented at the place where T. and G., the acceptors, made it payable, and Messrs. *Ladbroke's* were agents to the acceptors for that purpose. The plaintiffs have proved the cancellation to have been such as would not amount to a discharge of the bill.

Verdict for plaintiffs—Execution in a month.

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### DONALDSON *against* WILLIAMS.

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One of two joint tenants of a house where the partnership business is carried on, may authorize a servant of the partnership to remain on the premises, though the other has given him notice to leave the service.

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the said plaintiff to be, remain, and continue in the said dwelling-house in which &c., then being the dwelling-house of the said defendant and the said *A. Whyte*, and that the said plaintiff, at the said time when &c., was remaining and continuing in the said dwelling-house in which &c., then being the dwelling-house of the said defendant and the said *A. Whyte*, by the command and authority of the said *A. Whyte*, as he lawfully might, whereof the said defendant, before and at the said time when &c. had notice: wherefore because the said defendant did then and there assault the said plaintiff, as in the same plea mentioned, he the said plaintiff did then a little resist the said defendant, and in so doing did then and there necessarily make a little noise and disturbance in the said dwelling-house, as it was lawful for him to do. The rejoinder took issue on the replication.

At the trial before *Vaughan B.* at the *Middlesex* sittings in this term, the plaintiff had a verdict for 40s.

*Holt* for the defendant, moved for judgment non obstante veredicto, or for a replader. The issue tendered by the replication is immaterial and no answer to the plea; for *Whyte*, though partner in trade and joint tenant of the defendant's house with him, could not authorize the plaintiff, though a servant of the firm, to continue on the partnership premises after the plaintiff had been ordered by the defendant to quit, for disobedience of his lawful commands. To hold otherwise would be a destruction of the objects of the partnership.

LORD LYNTHURST C. B.—That argument would go the length of affirming that one joint tenant cannot authorize any person to continue in the house in which

he is jointly interested with another, against the will of that other. But I am of opinion that in this case the authority of the partners was co-extensive. *Whyte* therefore had a right to give this servant of the partnership orders to remain in the house, so that the plaintiff's staying on the premises under those orders was right, and affords a sufficient answer to the defendant's justification.

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*Per Curiam,*

Rule refused.

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WOOSNAM, Gent. one &c. *against* PRYCE.

**A** Rule had been obtained for setting aside proceedings on a bail bond for irregularity in taking an assignment pending a baron's order for stay of proceedings, and also on the ground that the bail was discharged by time being given to the principal, *Bayley* B. observing, that taking an assignment of the bail bond was not a step in a cause, unless process was issued on it. The facts were as follows:—The *quominus* was returnable 2 June 1832. The defendant was arrested, and a bail bond was given. The plaintiff sued on a bond and for his bill as an attorney. On the 3d a summons was taken out to tax the plaintiff's bill. An order to tax was granted on the defendant undertaking to pay in a fortnight after taxation. The attorney's

The assignment of a bail bond without more is not a step in a cause. A judge's order is a nullity if obtained by misrepresenting his decision. When the condition of a bail bond is broken, and the bail are fixed by assignment taken, time given by the plaintiff to the original defendant without their privy will not discharge them. Agreement not to tax attorney's bills discountenanced.

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clerks disputed whether this order operated as a stay of proceedings; and on the 10th another order for taxing the bill, with a clause for staying proceedings, was obtained by the clerk to the defendant's attorney from a clerk to a baron by a representation, now sworn not to be true, that the baron had ordered the proceedings to be stayed. No special bail being put in or appearance entered, the plaintiff on the same day took an assignment of the bail bond, and commenced an action on it. The defendant's attorney attended a meeting for taxing the bill, which had been appointed under the first order. The plaintiff and defendant afterwards came to terms, and without knowledge of the bail the plaintiff agreed to stay proceedings in the action for a month, if the defendant would not tax his bill.

*W. H. Watson* showed cause for the plaintiff. 1st. The assignment of the bail bond and proceedings thereon were regular, for the first order contained no declaration to stay proceedings; and the second, which did, was surreptitiously obtained. The defendant acted under the first order by attending to tax. No proceedings have been staid in the original action, it being on a bond as well as for the plaintiff's bill. 2dly. The bail were not prejudiced by the agreement to delay proceedings for a month at the instance of the defendant their principal, after the bail bond was forfeited and the original action gone; for they could not render or exonerate themselves in the long vacation of 1832. In *Farmer v. Thorley (a)*, recognized in *Clift v. Gye (b)*, it was held, that bail to the sheriff are discharged by the plaintiff's taking from the defendant,

(a) 4 B. &amp; Ald. 91.

(b) 9 B. &amp; Cr. 422.

without knowledge of the bail, a cognovit for the debt, payable by instalments; but a cognovit actionem could only be acknowledged by the defendant in court, and is inconsistent with simultaneous proceedings on the bail bond. In the cases cited, the assignment of the bail bond was not taken till after the enlarged time for paying the money had expired. Nor were the bail prejudiced by the terms of not having the plaintiff's bill taxed, for that may still be done after judgment obtained against them in the action on the bail bond.

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*Jervis* and *Knowles*, for the bail, supported the rule. It must be implied from the first order that the plaintiff's proceedings were to cease during the fortnight appointed for taxation; and the second distinctly stays them. At all events the bail were delayed from exonerating themselves during the month, and plaintiff's conduct led them to think it was not necessary to put in bail above after the month had elapsed, for no notice was then given to them that the defendant had not paid the debt; *Clist v. Gye* (a).

LORD LYNDHURST C.B.—The plaintiff's proceedings in this action could not be stayed by implication. Now the first order did not operate to stay proceedings; and the second was a nullity, having been surreptitiously obtained. Then the proceedings on the bail bond are regular. And as it remained a valid part of the first order that the plaintiff's bill of costs should be taxed, the bail have sustained no prejudice by the agreement entered into between the plaintiff and the defendant subsequent to their becoming liable.

(a) 9 B. & Cr. 422; see 15 East, 617; 4 Taunt. 456, 5 id. 319, 614; 7 id. 53; 5 T. R. 277.

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**BAYLEY B.**—As the bail were fixed before the agreement was entered into, the breach of the condition of the bail bond, and the assignment having taken place previously, they have not been injured by that agreement. As bail to the sheriff they were in a different situation from bail above, who might have rendered. The first order contained no stay of proceedings, and the second was void. The rule must be discharged, but without costs, as it was made part of the agreement on the plaintiff's behalf that his bill should not be taxed.

**VAUGHAN and GURNEY Bs.** concurred.

Rule discharged without costs.

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**COOK against ALLEN.**

A defendant who has not appeared is not entitled to an imparlance. In the Exchequer a plaintiff has four terms in which to enter a common appearance for a defendant under 12 G. 1. c. 29. s. 1.

**A** Rule had been granted for setting aside a judgment and execution on two grounds: 1st, that the appearance entered by the plaintiff for the defendant was not entered in due time; and 2dly, that the defendant was entitled to an imparlance to this term. The *quominus* was served on 1 *June* 1832, returnable on the 2d. Negotiations having been pending, no step was taken till the 3d *November*, when the plaintiff entered a common appearance for the defendant, according to stat. 12 G. 1. c. 29. The declaration was filed, and

notice of so doing served on 20th *November*. A rule to plead in eight days was given on the 22d. Interlocutory judgment was signed on the 1st *December*, and after notice to tax on the 7th, final judgment was signed, and a writ of *fi. fa.* issued on the 11th. On the 17th *December* a summons was taken out to stay proceedings before a learned baron, who, however, referred it to the court.

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*W. H. Watson* showed cause. First, the motion comes too late, and should have been made in term as soon as the plaintiff had declared, or at chambers before execution issued, and the plaintiff is not to suffer for the defendant's neglect to search the office to ascertain when the appearance was entered. (The Court appeared to assent.) Next, though an appearance entered by a plaintiff for a defendant under 12 G. 1. c. 29. must in K. B. be so entered within two terms, and a vacation after the term in which the writ was returnable, *Budgen v. Burr* (a), yet the practice of this court has always been to allow four terms for that purpose, viz. until the cause is out of court at the end of the year. *Price's Exchequer Practice* asserts the contrary, but is not correct.

Lastly, the defendant not having appeared, was not entitled to an imparlance, *Winter v. Barnes* (b). [*Bayley* B. The plaintiff has made no default in not declaring till the defendant was in court, then he could have no right to imparl.]

*J. Jervis* gave up the last point, but relied on *Budgen v. Burr*, and on *Price's Exchequer Practice*, in the

(a) 10 B. &amp; Cr. 437.

(b) 9 D. &amp; R. 18.

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absence of any express decision to the contrary in this court, and urged the convenience of assimilating the practice. Nor is the motion too late, *Budgen v. Burr, Smith v. Painter* (a); as the irregularity was not known till the 15th *December*.

After consulting the master,

Lord LYNTHURST C. B.—There is no difference of opinion among the officers of the court. The master reports that the practice of this court is, that a plaintiff may enter a common appearance for a defendant within four terms. That practice will be adhered to, unless any inconvenience is shown to result from it. As to the lateness of the motion, had the defendant applied in the first instance to the officer, he would have apprised him of the irregularity, and it is at least extremely inconvenient that the objection should be taken at a stage of the case when additional expenses have been incurred by the other side.

The rest of the Court concurring,

Rule discharged with costs, being so moved.

(a) 2 T. R. 719.

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1833.

HASKER *against* JARMAINE.

**A** Rule to show cause had been granted to set aside the service of a writ for irregularity in not bearing on the face of it the date of the day when it issued, pursuant to 2 W. 4. c. 39. s. 12. and Schedule No. I.

A rule for setting aside the service of a writ for irregularity was discharged, on its being shown for cause that the irregularity occurred in the writ itself.

*Platt* showed for cause that as the date appeared by the indorsement it was sufficient. [*Bayley* B. We have held the reverse (a)]. If the blank left makes the writ irregular, the service is unimpeached, but the rule is to set aside the service.

*Chilton* in support of the rule. If the writ is irregular, the service of it cannot be regular. In *Millar v. Bowden* (b) the irregularity was, that the day of the month and year in which the writ was issued was not indorsed on it, according to *Reg. Gen. Mich.* 1 W. 4. The rule was to set aside the service, and no objection was made to it on that ground.

**BAYLEY B.**—Had the motion been to set aside the writ and service, or the writ or service, the court might have discharged the rule as to the service, and made it absolute as to the writ. In this case the defendant has been served with a true copy of the writ itself, without any irregularity in the manner of the service. Now though the objection is to the writ itself, the service of it is all against which this application is directed. Had the writ been regular, and borne date the day it was issued, but an incorrect copy had been

(a) By 2 W. 4. c. 39. s. 1. the day of the month and week of the service of the writ are to be indorsed on it.

(b) 2 Tyr. R. 112.

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served omitting the date, the defendant would not have been duly served with a true copy.

The other barons concurring,

Rule discharged without costs.

### DEACON *against* FULLER.

If after a rule for a new trial has been made absolute, the party succeeding on that rule suffers more than four terms to elapse without taking the case down to trial, a term's notice of motion is necessary to discharge the rule, as either party may try by proviso.

An order to change an attorney is not a proceeding in a cause dispensing with a term's notice of proceeding.

THE defendant obtained a verdict. A rule for a new trial was made absolute in *Hilary* term 1829. No step was taken afterwards, but on 10th *December* the defendant's attorney was changed by an order on consent.

*Mansel* now moved to discharge the rule for a new trial. First, a term's notice of intention to proceed is not necessary; *Roe d. Hutchings v. Dunning* (a). *Theobald v. Crichmore* (b), and *Hockin v. Reeve* (c) are analogous in principle, as is *Tipton v. Meeke* (d); but 2dly, the order to change the attorney was a sufficient step in the cause to dispense with the term's notice.

BAYLEY B. (sitting alone).—On the first point *Tipton v. Meeke* has decided that where the plaintiff obtained a rule for a new trial, but neglected to carry the cause down for trial for more than four terms, the court would not discharge the rule on motion, unless a term's notice of the motion had been previously given. And I think upon principle that as a legal end may be put to the cause in another mode, viz. by either party taking down the record for trial by proviso, we ought not to

(a) *Barnes*, 308.

(b) 2 B. & Ald. 594; 1 Chitt. R. 317. See 9 B. & Cr. 621.

(c) 2 Y. & J. 275.

(d) 8 B. M. 579.

rescind the rule for a new trial. On the other point the change of an attorney is no step in a cause, and would not appear on the record.

Rule refused.

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v.  
FULLER.

**WILLIAMS against DAVIES** Gent. one &c.

**A**SSUMPSIT by the indorsee against the acceptor of certain bills, and on the common counts. Pleas, general issue, statute of limitations, and a set-off for the defendant's services as an attorney. The trial took place before Lord *Lyndhurst* C. B. at the *Middlesex* sittings after last term. The plaintiff proved a demand of 20*l.* 6*s.* 8*d.* against the defendant, and announced that he had acceptances to produce proving more to be due, but should not produce them unless the defendant established his set-off. *Chilton* for defendant then objected that the plaintiff ought to prove his whole demand in the outset, and ought not to be permitted to give his evidence by parts, one part in the first instance, and the other in reply after hearing the defendant's case. The case proceeded, and the defendant proved a set-off to the amount of 65*l.* 17*s.* for services as an attorney. The learned judge then suffered the plaintiff to give in evidence two bills which the plaintiff had accepted and paid for the defendant's accommodation. As the amount of those bills overtopped the set-off, the plaintiff had a verdict.

Where a plaintiff is able to establish two demands against a defendant, but abstains from proving more than one in the first instance, on which the defendant proceeds to prove a set-off to a larger amount, the judge may in his discretion suffer the plaintiff to prove his other demand in reply, so as to overtop the cross-demand set up by the defendant.

*Chilton* now moved for a new trial, on the ground taken at the trial, and cited *Rees v. Smith* (a) for the

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general rule there stated by Lord *Ellenborough*, that when, by pleading or by means of notice, the defence is known, the plaintiff's counsel is bound to open the whole case in chief, and cannot proceed in parts; and that when it is known what the question in issue is, it must be met at once. The bills produced by the plaintiff in order to overtop the defendant's set-off, had no relation to it. [*Vaughan B.* It might be that they were given and paid for the business done, which formed the subject of your set-off.] He also cited *Browne v. Munday* (a).

LORD LYNTHURST C. B.—It was said for the plaintiff that it was not necessary to put the acceptances in evidence, unless the defendant relied on his set-off. It might therefore be most convenient to rest the plaintiff's case there, because the set-off might not be gone into. The consequence of making it imperative on plaintiffs to produce their whole claims, would be, that if they had long accounts containing many items and extending over several years, the whole must be gone through without occasion. One course or the other must be adopted, according to the nature of the case, and the presiding judge can form the best opinion *at the time*, whether the evidence should be admitted or rejected at the particular moment when it is offered. If he decides to admit it, and it is admitted, there can be no objection on that account.

BAYLEY B.—Is there an instance of a verdict having been set aside because a judge, in the exercise of his discretion, *allowed* additional evidence to be given by either party at a later period of the cause? Had he rejected such evidence on the ground that the party's

(a) *Ryan & Moody*, N. P. C. 254.

case was closed, the question of properly rejected or not might have arisen on a motion for a new trial. Here the plaintiff claims a lesser sum than that which he is able to establish, and seeks to recover that sum only. Then the defendant relies on and proves a cross-demand, by way of set-off, to a larger amount than the sum before proved by the plaintiff. Then the plaintiff has a right to say, I have not proved all I can do, if that shall become necessary. The defendant's course made it necessary, and the plaintiff had a right to meet the set-off in reply.

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Rule refused (a).

(a) Other points were afterwards urged, without disturbing the verdict.

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FORBES *against* KING and Eight Others.

**T**HE declaration was in case containing 16 counts.

Six of the nine defendants pleaded not guilty to the whole. The three others employed one attorney, and two of them joined in demurring to the 5th and 11th counts, and pleading not guilty to the rest of the declaration. The remaining defendant demurred to the same counts, and pleaded in like manner, but separately. The court having given judgment for these defendants on their demurrers, their attorney gave two separate rules for judgment on them, serving two separate bills of costs therein and two separate notices of taxation.

Where some of several defendants demur to particular counts, and plead not guilty to the rest, while the other defendants plead not guilty to the whole, the defendants who demur cannot, on obtaining judgment on their demurrers pending the trial of the issues in fact, tax their costs on that judgment. Nor, *semble*, can they have judgment for them under 8 & 9 W.3.c.11.s.2.

*Mansel* for the plaintiff, obtained a rule for setting aside these notices of taxation, and staying proceedings thereon. The issues in fact are not yet tried. Then costs cannot be claimed by these defendants till some

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general judgment of the court is obtained in favour of all the defendants in the cause. For the plaintiff may yet obtain a verdict against the six first defendants who have not demurred, and the counts here demurred to may be good after that verdict. So he may obtain a verdict on the other counts against those who have so demurred. In that event they will not be entitled to costs on their demurrers; *Astley v. Young* (a). If these defendants had been acquitted by verdict, they would not be entitled to costs under sect. 1 of 8 & 9 W. 3. c. 11., this being an action on the case (b). Then they cannot recover costs under sect. 2 of that act, though they have obtained judgment on demurrer (c). At all events they are premature, for if they can in any event recover the costs of issues found for them, those costs can only be *deducted* from the plaintiff's costs. *Reg. Gen. Hil. 2 W. 4. No. 74.*

The Court took time to consider, and afterwards granted a rule, against which

*Hutchinson* showed cause, citing 8 & 9 W. 3. c. 11. s. 2.

BAYLEY B.—It appears to me that one or more of several defendants are not entitled to a judgment for the costs of a demurrer in the present stage of the proceedings, though they may afterwards become entitled to them as costs in the cause, and may then set them off. No statute appears to me to give them a right to these costs; then it would be error on the record to give a judgment upon them, they must

(a) Burr. 1233, mentioned in the judgment in 1 East, 263.

(b) Stra. 1005; Tidd, 9 ed. 986.

(c) 1 H. Bla. 550; Cas. Pr. C. P. 25; but see *id.* 4, *contra*, Tidd, 989.

await the determination of the cause. But these defendants may enter on the record a prayer of costs, which may be allowed or refused by the court, and if refused, error may be brought.

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*Per Curiam.*

Rule absolute.

POOLE and Another *against* PEMBREY and ANN MARY  
PEMBREY, his Wife.

**T**OMLINSON had obtained a rule to set aside a plea in abatement, on the ground that the name of the female defendant, in the title of the affidavit verifying it, was *Mary Ann Pembrey* instead of *Ann Mary Pembrey*, as in the appearance and declaration. He cited *Edwards v. Setree (a)*.

A plea in abatement will be set aside, where the title of the affidavit verifying the plea contained a transposition of the names forming the Christian name of one of the defendants.

*Addison* showed for cause that as it clearly appeared from the title to the affidavit that the female named was wife of the other defendant, that was sufficient to prevent doubt as to the identity of the person sued.

But per BAYLEY B.—This affidavit is clearly not an affidavit in the original cause, for the transposition of *Mary Ann* for *Ann Mary* has substantially altered the name in which she is sued. The argument to the contrary would tend to show that the Christian name of the wife need not be stated. No indictment for perjury could be sustained on this affidavit, for no cause is pending in which *Mary Ann Pembrey* was defendant.

(a) 3 Pri. 197.

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and Another

v.

PEMBREY  
and Wife.

*Per Curiam.*—Rule absolute without costs. The plaintiff not to sign judgment unless the defendants make default in pleading issuably, or in paying the debt and costs of the cause (not including the costs of the motion) within ten days; and in case of defendant's pleading issuably, he is to rejoin gratis, and take short notice of trial.

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SABINE *against* FIELD.

The court will not allow the plaintiff to sign judgment in *sci. fa.* pursuant to *Reg. Gen. Hil. 2 W. 4. No. 81*, on two returns of *nihil* to two writs of *sci. fa.* where it does not appear that attempts have been made to give the defendant notice.

THE sheriff having returned *nihil* to two writs of *sci. fa.*, Platt moved, under *Reg. Gen. Hil. 2 W. 4. No. 81*, for leave to sign judgment, eight days having elapsed from the return of the first *sci. fa.*

But *per Curiam.* One of the objects of that rule was to prevent the plaintiff in *sci. fa.* from going on, behind the party's back, to obtain judgment and execution on the return of two *nibils*, and to compel the plaintiff to procure him to be summoned. It does not here appear that attempts have been made to give him notice.

Rule refused (a).

(a) See Tidd, 1124, 9 edit., and *Kennedy v. Lord Oxford*, 1 Dowl. 613.

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FOSTER and Others *against* BURTON.


*Semble*, that a judge sitting at chambers has no power out of term to quash a demurrer, even if it appear to be sham, and

A Rule had been obtained by *Mansel* for rescinding an order made by a baron, in vacation, to quash the defendant's demurrer as appearing to be sham, for the purposes of delay, and to sign final judgment in ten days.

pleaded for the purposes of delay,



*Cowling* showed cause on several grounds. As to the baron's power to make the order, he mentioned *Doe d. Prescott v. Roe (a)*, and 11 G. 4. and 1 W. 4. c. 70. s. 1.

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LORD LYNTHURST C. B.—Assuming a demurrer to be absolutely sham on the face of it, and to appear to be pleaded for the purposes of delay, has a single judge at chambers power to quash it?

BAYLEY B.—I know no authority for making such an order by a single judge. The act cited only applies to a single judge sitting in term, while the other judges are sitting in banc.

*Per Curiam*—Rule absolute on certain terms (b).

(a) 9 Bing. 104.

(b) See *Spicer v. Todd*, 2 Tyr. R. 172; and *Nanney v. Kenrick*, 1 Dowl. 609.

## MEMORANDA.

LATE in this term *Thomas Noon Talfourd Esq.* of the *Middle Temple*, was raised to the degree of the Coif, and gave rings with the motto "*Magna vis veritatis.*"

Shortly after the term *David Pollock Esq.*, *Philip Courtenay Esq.*, *John Blackburne Esq.*, and *W. H. Maule Esq.*, were appointed King's Counsel.

END OF HILARY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS,

AND

EXCHEQUER CHAMBER,

IN

*Easter Term,*

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

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The Archbishop of CANTERBURY *against*  
ROBERTSON.

An administrator having received assets of the intestate, converted them to his own use, and became bankrupt before he had exhibited an inventory or made his account pursuant to the bond given under the statute of distributions, 22 C. 2. c. 10. and before any decree to pay or deliver the residue to the next of kin was obtained. The ecclesiastical court discharged him from the suit there, he having obtained his certificate as a bankrupt:—Held, that his malfeasance in converting to his own use the intestate's assets, so that they were entirely lost to his estate, was a breach of the clause of the condition "well and truly to administer" them; and consequently that the surety in the administration bond was liable for the full amount of the money misapplied.

Assuming that it is a defence to breaches assigned on an administration bond for not exhibiting a perfect inventory, or making true and just account at or before a particular day, that no court sat on that day, it should be pleaded in excuse of performance, and cannot be given in evidence before a jury on the trial of breaches suggested on the roll under 8 & 9 W. 3. c. 11. s. 8.

No breach of the administration bond accrues by the administrator's not distributing the residue among the next of kin till after decree of the ecclesiastical court.

in which the archbishop of *Canterbury* was obligee, and the defendant with one *John Henry Skelton*, and *J. Skelton* deceased, were the obligors. The defendant pleaded non est factum, upon which the plaintiff joined issue and then set out the bond and condition. The condition was, that if *John Henry Skelton*, the lawful father and the curator or guardian lawfully assigned to *J. H. S.*, *J. S. S.*, *M. A. S.*, and *L. S.*, minors, the lawful nephews and nieces of *Charles Frederick Schweitzer*, formerly of &c. deceased, and administrator of all and singular the goods, chattels, and credits of the said deceased, for the use and benefit of the said minors, and, until one of them shall attain the age of 21 years, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of him the said *J. H. S.*, or into the hands and possession of any person or persons for him, and the same so made do exhibit or cause to be exhibited in the registry of the prerogative court of *Canterbury* at or before the last day of *November* next ensuing, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said *J. H. S.*, or into the hands or possession of any other person or persons for him, do well and truly administer according to law; and further do make or cause to be made a true and just account of his said administration at or before the last day of *May* 1831; and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's accounts, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall

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deliver and pay unto such person or persons respectively as the said judge or judges by his or their decree or sentence (pursuant to the true intent and meaning of an act of parliament, intituled "An act for the better settling of intestates' estates,") shall limit and appoint; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same in the said court, making request to have it allowed and approved accordingly, if the said *J. H. S.* being thereunto required do render and deliver the said letters of administration, approbation of such testament being first had and made in the said court, then the bond was to be void and of none effect, or else to remain in full force and virtue.

Upon this condition the four following breaches were suggested by the plaintiff in his replication.

1st. That the said *John Henry Skelton* (the administrator) did not make or cause to be made a true and perfect or other inventory of all and singular the goods, chattels, and credits of the said *C. F. S.* deceased, which had come to the hands, possession, or knowledge of him the said *J. H. S.*, and did not nor would exhibit or cause to be exhibited in the registry of the prerogative court of *Canterbury* a true and perfect inventory or any other inventory at or before the last day of *November* next after the date of the said writing obligatory, or at any other time, contrary to the form and effect of the condition of the said writing obligatory.


2d. That the said *J. H. S.* (the administrator) did not nor would well and truly administer according to law the goods, chattels, and credits of the said *C. F. S.* deceased, which came to the hands and possession of the said *J. H. S.* after the death of the said *C. F. S.*, amounting in the whole to 30,000*l.*, but, on the contrary thereof, he the said *J. H. S.* after the same so came to his hands and

possession aforesaid, and before any or either of the said minors in the said condition mentioned attained the age of 21 years, wrongfully, unjustly, and injuriously, and contrary to the intent and meaning of the said writing obligatory, wasted the same, and converted, appropriated, and disposed of the same goods, chattels, and credits, being of the value aforesaid, to his own use, and the same remain wholly unadministered, contrary &c.

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3d. That the said *John Henry Skelton* (the administrator) did not make or cause to be made a true and just account of his said administration at or before the last day of *May* 1831, or at any time before or since the day and year last aforesaid, but on the contrary thereof wholly neglected and refused so to do, contrary &c.

4th. That on 17 *November* 1828, the said *Charles Frederick Schweitzer* died intestate, leaving *J. G. S.* and *F. C.*, *J. H. S.* the younger, *J. S. S.*, *M. A. S.*, and *L. S.*, his next of kin. That afterwards and after the death of the said *C. F. S.*, and after paying and discharging of all the just debts, claims, and demands of the said *C. F. S.*, and before the exhibiting of the said plaintiff's bill, to wit, on 1st *January* 1831, there remained and was in the hands and possession of the said *J. H. S.*, as administrator as aforesaid, a large sum of money, to wit, the sum of 10,875*l.* 8*s.* 9*d.*, which might and ought, according to the condition of the said writing obligatory, to have been well and truly administered by the said *J. H. S.* according to law, in manner following (that is to say), the sum of 5331*l.* 14*s.* 10½*d.* to *Elizabeth Younge* spinster, administratrix, with the will annexed of all and singular the goods, chattels, and credits of the said *J. G. S.* deceased, for the use and benefit of *A. F. S.* daughter and universal legatee of the said

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*J. G. S.* deceased, the sum of 211*l.* 19*s.* to the said *F. C.*, the sum of 1332*l.* 18*s.* 8½*d.* to the said *J. H. S.* the younger, the sum of 1332*l.* 18*s.* 8½*d.* to the said *J. S. S.*, the sum of 1332*l.* 18*s.* 8½*d.* to the said *M. A. S.*, and the sum of 1332*l.* 18*s.* 8½*d.* to the said *L. S.*; yet the said *J. H. S.* hath not well and truly administered the last-mentioned goods, chattels, and credits of the said *C. F. S.* deceased, or any part thereof, according to law, or paid or delivered or divided the same in manner aforesaid or otherwise howsoever, but on the contrary thereof, whilst the said letters of administration were in full force and effect, wrongfully, fraudulently, and unjustly converted and appropriated the same to his own use, contrary to the form and effect of the said condition of the said writing obligatory, and the said several sums of money still remain unadministered and wholly due and unpaid to the said *E. Y.* administratrix as aforesaid, and to the said *F. C.*, *J. H. S.* the younger, *J. S. S.*, *M. A. S.*, and *L. S.* respectively.

At the trial at the *London* sittings after *Michaelmas* term 1832, before Lord *Lyndhurst* C. B., a verdict was found for the plaintiff on the issue on the plea of non est factum with 1*s.* damages, and 1*s.* damages on each of the breaches, subject to the opinion of the court on the following case.—*Charles Frederick Schweitzer* in the condition named died on the 17 November 1828, intestate, leaving as next of kin *J. G. S.* his brother, *F. C.* his sister, and *J. H. S.* the younger, *J. S. S.*, *M. A. S.*, and *L. S.* infants, the children of *John Henry Skelton* by a deceased sister of the intestate. *J. G. S.* died in about six weeks after the intestate, leaving *A. F. S.* a minor his universal legatee and sole executrix: Administration of his estate and effects with the will annexed was duly granted to *E. Y. F. C.* having renounced her right to administration of *Charles*

*Frederick Schweitzer's* estate, administration thereof was duly granted on the 1st *June* 1830 to *John Henry Skelton*, one of the obligors named in the bond, as the father and guardian before then appointed by the prerogative court to his children, the above-named infants, nephews and nieces of the intestate, during the minority of the said infants, and until the eldest, that is to say, *J. H. S.* the younger came of age. The principal part of *C. F. S.*'s property consisted of stock invested and standing in his name at the time of his death in the 3 per cent. consols. This stock *J. H. S.* the administrator sold out in the month of *June* 1830, and opened an account with the proceeds amounting to 23,093*l.* 15*s.* in his own name in the Bank of *England*. He also received and paid into his said account 1125*l.* dividends due on the stock, and 575*l.* a cash balance standing to intestate's credit at the Bank. Between the 2d of *June* and the 25 *July* 1830, the administrator paid all the debts and funeral expenses of the intestate, and the expenses of and incident to his administration, by applying 14,065*l.* 14*s.* 8*d.* in the course of the administration.

In *September* 1830, the administrator made out an account and delivered the same to said *Miss E. Y.* the guardian of the said *A. F. S.*, a copy of which account is hereunto annexed.


By the end of *July* 1830, the administrator appropriated the sums of 4941*l.* 19*s.* and 5119*l.* 15*s.* 10*d.* to his own use, became bankrupt on 2d *June* 1831, and obtained his certificate on 15 *September* 1831.

The prerogative court never requires an administrator to deliver an inventory or account before citation, and the same is very seldom delivered until called for.

On 13 *June* 1831, a citation issued against *J. H. S.* the administrator, from the prerogative court, at the

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instance of *E. Y.* as administratrix, to which he appeared; and on 5th *July* 1831, brought in an inventory and account on oath, and was dismissed in respect of the same if not objected to on the caveat day in *August* following.


On 1st *December* 1831, *E. Y.*'s proctor prayed the judge of the ecclesiastical court to allow the declaration instead of an inventory and account, and then in the registry of the court; and the judge having heard advocates and proctors thereon on both sides, and having examined and allowed the inventory and the account exhibited, the same not having been objected to, referred the inventory and the account to the register of the prerogative court to report the amount of the rest and residue of the goods, chattels, and credits of the intestate remaining on the administration account, and to what person or persons respectively the said residue was to be limited and appointed, and in what portions allotted; and directed all other matters to stand continued until the said report was brought in. On 9th *December*, in the same year, he reported that it appeared upon the administrator's accounts that a balance of 10,875*l.* 8*s.* 9*d.* remained unadministered, of which sum *E. Younge*, as, administratrix of *J. G. Schweitzer*, was entitled to 5331*l.* 14*s.* 10½*d.*, the four children of the administrator *J. H. Skelton* to 5331*l.* 14*s.* 10½*d.*, and *F. Choppin* to a small sum to make up her full share of 5331*l.* 14*s.* 10½*d.* On the 4 *January* 1832, this report was confirmed by the prerogative court. On the 1st *February* Miss *Younge*'s proctor prayed the judge to decree distribution of 10,875*l.* 8*s.* 9*d.* remaining to be distributed according to the register's report; to which *J. H. Skelton* by his proctor objected. He then asserted an allegation in the nature of a plea, showing cause



why no order could be made on him the said *J. H. Skelton* to pay or distribute any part of the goods, chattels, and credits of the said *C. F. Schweitzer* deceased. The reasons stated by the said *J. H. Skelton* in and by that allegation why no such order could be made upon him were two: 1st. That his eldest son *J. H. S.* having attained his age of 21 years on the 21st *July* 1831, the grant of administration to him (*J. H. S.* senior) had ceased, and that there was then no legal personal representative of the said *C. F. Schweitzer* deceased; and 2dly, that he had been a trader according to the provisions of the bankrupt law; that on 7th *June* a commission of bankrupt had issued against him, that he had in all things conformed himself to the bankrupt laws, and had duly obtained his certificate of conformity, which was allowed by the lord chancellor on 15th *September* 1831. On 20 *February* 1832, Miss *Younge's* proctor on her behalf admitted the several positions or articles of *J. H. Skelton's* allegation (which had previously been admitted by the court to proof,) to be true, reserving for the consideration of the court all questions of law.

On 25th *February* 1832, *J. H. Skelton* prayed the judge to pronounce him not liable to be ordered to distribute the balance of the estate and effects of the intestate by reason of his being a certificated bankrupt, and to dismiss him from the suit; and the judge of the prerogative court having read the evidence and heard advocates on both sides, dismissed the said *J. H. Skelton* from the suit and all further observance of justice therein.

*J. H. Skelton* the administrator, in *October* 1830 and *April* 1831, paid to Miss *Schweitzer* half-yearly dividends of 86*l.* 18*s.* 4*d.* each, as if that sum had so been invested. In fact he never invested the money.

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*J. H. Skelton* the younger, the eldest son of the administrator, came of age on the 21st *July* 1831, during the pendency of the suit in the prerogative court. None of the children of the said *J. H. Skelton* the administrator were parties to the proceedings in the prerogative court, and the bond was ordered to be attended with to be sued upon at the instance of the said *E. Younge* alone. A release has been executed by *F. Choppin*, and upon whose share no question arises.

There was no sitting of the prerogative court on the last day of *November* 1830, nor on the last day of *May* 1831; no party can render an account without a court; the administrator might have procured special courts to be held on those days, and there were sittings between the date of the receipt by the administrator of the monies and stock and the last day of *November* 1830, and between that day and the last day of *May* 1831, at which an inventory and account might have been rendered, and if an inventory and account had been given in before or on either the first or second court day subsequent to the last day of *May* 1831, a decree might, provided it was an amicable proceeding and unless there was any objection, have been obtained by the 27th *June* 1831, for the payment of the sums unadministered.

The question for the opinion of the court is—1st. Whether there is any breach of the condition of the bond assigned upon the record on which the surety *Robertson* can be charged in this action?

The court are to give any directions they think proper on the whole record: but if it is of opinion that there is any breach of the condition suggested in the record, on which damages can be entered up, the court shall order what damages shall be assessed on any of the breaches.

*F. Kelly* for the plaintiff. The question is, whether the act of the administrator in wasting and converting to his own use a large amount of the effects of the intestate, which came to his hands as administrator, is or is not a breach of that part of the condition which bound him "well and truly to administer them according to law?" That question is raised by the second breach; and the plaintiff contends, that taking the facts found in the case with the plain grammatical construction of the condition, this surety is liable on that breach for the whole damages claimed. Nor are the decisions contrary. In the *Archbishop of Canterbury v. Tappen* (a), it was decided that the mere neglect or nonfeasance of an administrator in forbearing to distribute the surplus according to the statute of distributions 22 & 23 C. 2. c. 10. is not a breach of the condition of the administration bond, till a decree is made for that purpose. There the defendant pleaded affirmatively that he had performed the three first branches of the condition, and, as to the fourth, that he was not then bound by law, *i. e.* by the decree of the spiritual court, to perform it. He, in fact, relied on having done all that he was required to do, and no question of mis- or mal-appropriation by him arose, as in this case, where only non est factum is pleaded. Some obiter expressions of *Holt C. J.* in *Archbishop of Canterbury v. Wills* (b), are all that can be quoted against the plaintiff; for all that was there decided was, that since stat. 22 C. 2. c. 10. an administrator is obliged by his bond to give in his account in the spiritual court without citation. *Holt C. J.* says, "Since the statute of Car. 2. the condition of administration bonds being

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(a) 8 B. & Cr. 151; and see this case *cor.* *Sir John Nicholl*, 3 Addams's R. 68.

(b) 1 Salk. 315, S. C. *nom. Willis*, 1 Salk. 172, and *nom. Willett*, 11 Mod. 145.

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that the administrator shall account at a day certain, he must account accordingly at his peril, and that without citation or suit; and this account must be in court, and if he comes at the day and no court is held, he shall be excused, for he may plead he was ready, and no court, &c. But then this account is not examinable unless a party interested comes in and controverts it." His succeeding observations, as cited and relied on by Lord *Tenterden* in *Tappen's* case, are in favour of the plaintiff: "And whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and *therefore* a creditor (a) shall not take an assignment of the bond and sue it, and assign for breach the *non*-payment of a debt to him." And though he adds "or a *devastavit* by the administrator, for that would be needless and infinite;" the case of such a *devastavit* as this was not then before the court; and the inconvenience that as debts are payable *in præsenti*, the administrator, as soon as he received the intestate's money, might be instantly guilty of nonfeasance and incur a breach of the bond, does not apply to the present case.

Lord *Holt's* words cannot be restricted to this, that bringing in an account would satisfy the words "truly administer," the two things being so wholly different; all they mean is, that a creditor, on learning the fact of a payment made to an executor, cannot immediately suggest a breach of the bond well and truly to administer, or no man would be an administrator; and they do not show that a *devastavit* by an administrator is not a breach of that clause. *Greenside and others v. Benson* and others (b), decides that the obligee of an

(a) See *Wallis v. Pipon*, Ambler, 183.

(b) 3 Atk. R. 248, 252.

d ministration bond may assign a breach in not delivering a perfect inventory without citation; so that Lord *Hardwicke's* judgment only shows that a breach assigning the non-payment of the intestate's debts, would be no breach; and Lord *Tenterden* cites it in *Tappen's* case, for the same purpose as *The Archbishop of Canterbury v. Wills*. [Lord *Lyndhurst* C. B. In *Greenside v. Benson*, as reported by *Atkyns*, it is said (a) that at the trial no defence was made by the sureties, and that there was judgment by default; but there was clearly a verdict, which the lord chancellor refused to disturb (b). *Bayley* B. Non est factum, in this case, amounts virtually to judgment by default. *Vaughan* B. The breach assigned in *Greenside v. Benson*, appears from *Atkyns* to have been the not exhibiting a true and perfect inventory (c).] No case decides that an administrator's misfeasance in fraudulently misappropriating the assets, is not a breach of the condition in question. The legislature, in passing stat. 22 Car. 2. c. 10, contemplated the probable necessity (d) of the granting administration to many traders, and needy or dishonest persons; and therefore provided for the ultimate security of the next of kin, by imperatively requiring bond from the administrator, "with two or more able sureties, respect being had to the value of the estate." Nor is it here

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(a) p. 249.

(b) p. 253. *Kelly* afterwards stated to the court, that on the record referred to in *Atkyns*, the declaration was for the penalty of the bond; the plea was performance of the whole condition; and the single replication was, that the administrator had not exhibited an inventory.

(c) p. 248. and see post, 404, n. (c).

(d) *Mandamus* lies to compel a grant of probate to an executor who is insolvent, and has absconded. *Rex v. Sir Richard Raines* (Judge of the Prerogative Court), Carth. 437; S. C. Lord Raym. 361; 1 Salk. 299; 3 Salk. 162; Holt, 310; 12 Mod. 205; Stra. 672; but see *Hill v. Mills*, 1 Shower, 295, as to the difference between the grant of probate and administration, per *Sir Richard Raines*; and see 2 P. Wms. 165, 3 ed. 337.

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sought to charge a surety for a mere nonfeazance by his principal, but for his specific malfeazance. The distinct nature of the matters enjoined by the four clauses of this condition, and the difference in the terms used for each, shows that decisions on other clauses do not apply to this. For, first, the administrator is to make and exhibit a true and perfect inventory of the intestate's goods. 2d. He is well and truly to administer them according to law. 3d. He is to make a true account of his administration. 4th. He is to deliver and pay the residue remaining on his account, to the persons appointed by decree of the spiritual court; and 5th, to deliver into court the letters of administration, if any, which shall appear. Now, it being held in *Tappen's* case, that a neglect to distribute the surplus before decree of the court to do so, is not a breach of the condition well and truly to administer according to law, what does that obligation bind the administrator to do in the interval between his receipt of the intestate's chattels and the decree? If the legislature had not intended that something should be done by him which should require sureties, viz. the securely keeping the assets, the statute would, in many cases, be nugatory. Suppose an administrator to receive a sum, and having converted it to his own use, to die intestate before the time admitted of making a decree calling on him to pay over the surplus, could the surety contend that to be no breach of the bond? For if his next of kin would not administer, the ordinary or the officer of the court must. Then, if it were held that no misappropriation of the original intestate's assets could take place before the decree, the statute would be ineffectual. Here an administrator has become bankrupt, and having obtained his certificate before the decree to pay over the surplus, no benefit arises to the next of kin or creditors from that decree; for the spiritual court has discharged him

from liability to repay. Then, is the statute, and the bond given under it, ineffectual in such a case? Must there be a decree in every case, before there can be a breach of the condition? Since the statute of distributions, administrators and next of kin are like executors and legatees, or rather they are executors and legatees in law; *per Shower* arguendo, *Blackborough v. Davis* (a). Now, as the second clause of the condition prescribes it to administrators well and truly to administer, and subsequently in the same instrument, to distribute to persons appointed by decree of the spiritual judge, according to the statute; the inference, from construing one part of the condition by reference to another, would be, that where no decree is mentioned as a requisite, none need have previously taken place; and that well and truly administering means something to be done with reference to the account (b), but before rendering it; *viz.* by using due diligence in collecting the assets, and keeping them securely with a view to rendering final accounts when called on by decree. But how can conversion by the administrator to his own use in the interim be other than contrary to those words? The legal meaning of administer is no more than intermeddling (c). If such a taking and conversion of the intestate's property as this be an administration, it is also a *devastavit*, and a breach of the condition well and truly to administer (d). [Lord *Lyndhurst* C. B. Do you contend that a surety is liable in every case of *devastavit*?] No, only in case of mal-administration. [Lord *Lyndhurst* C. B. The words well and truly to administer according to law,

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(a) 12 Mod. 621; 11 Vin. 54; and see *Butler v. Hammond*, Holt's R. 660.

(b) *Archbishop of Canterbury v. Wills or Willis*, 1 Salk. 315; 11 Mod. 145; S. C. nom. *Willitt*.

(c) See *Wentworth's Office of Executor*, 41; old edit.

(d) *Ibid.* 115, old edit.; *Toller*, 3d edit. 424, ch. ix.

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must be construed in their natural and ordinary interpretation. Paying debts out of their order cannot be said to be a well and truly administering (a). That case continually occurs; then how does it happen that many actions are not brought against sureties for the misconduct of the administrators in so doing? The creditor has generally a more ready mode of obtaining justice by suing the administrator. [Lord *Lyndhurst* C. B. It continually happens in equity that administrators are called on to pay into court sums, the full amount of which they cannot so pay in; but I know of no actions against their sureties on account of that non-payment.] The infrequency of actions on these bonds does not prove that they may not be sustained to prevent the statute from becoming ineffectual, as in this case; for here the bankrupt administrator has been declared by the spiritual court discharged from liability to repay the sum embezzled by him (b); and if his embezzlement is not a breach of the condition, the object of the act is defeated. Such actions are equally rare for the purpose of recovering the residue after a decree obtained for paying it over. The breaches assigned in *The Archbishop of Canterbury v. Howse*, do not appear in the report of *Cowper* (c). [Lord *Lyndhurst*.

(a) See Toller, chap. ix.

(b) See *Younge v. Skelton*, cor. Sir John Nicholl, 3 Hagg. R. 780. Mich. 1831.

(c) Cowp. 140. Loft, 622, S. C. It was afterwards ascertained by searching the records of *Michaelmas* term, 15 Geo. 3, A. D. 1774, Roll. 703, that the pleadings and judgment were similar to those in *Ward v. Weston*, Trin. 16 & 17 Geo. 2, 1743, Roll. 257, which was an action on the same bond as that out of which arose *Greenside v. Benson*, reported in *Atkyns*, the defendant *Weston* being another of the sureties. The declaration in *Ward v. Weston* was on a common administration bond, dated 9th March, 1741. Bond and condition set out on oyer. *Plea*, that the administratrix did make and exhibit an inventory before the day named in the condition, &c. That the administratrix had well and truly administered, &c. That the administratrix did make




That case was stopped in the early stage of it; all that is there decided is, that a creditor may sue on an administration bond in the name of the archbishop.] Lord *Mansfield*, however, there refers to the various clauses of the condition in the bond as substantial matters to be really performed. Lord *Tenterden* did the same in *Tappen's* case; that answers the fact of the infrequency of actions on it. If due administration be not the secure keeping of the assets till the decree for their distribution, how can a creditor be (in the words of Lord *Mansfield*) "most materially and principally interested in the administrator's delivering in a true inventory, and in the due administration of the effects?"

On the first and third breaches for non-delivery of an inventory and account, the question will be, whether real or nominal damages should be assessed. If the court shall not decide for the plaintiff on the second breach, he claims the whole damages on those breaches also, on the ground that if the account and inventory had been severally brought in before or on the respective days named in the bond, the parties entitled might have obtained a decree before the bankrupt administrator obtained his certificate, in which event he would have been decreed to pay the money. Whether the making the decree had been resisted or not, it might have been made so as to enable the plaintiff to sue the surety,

a just account of her said administration, and that upon the account there were not found any goods remaining to be administered; and that there was no will found, &c. *Replication*, that the administratrix did not make and exhibit a true and perfect inventory of the goods, &c. of the deceased, as the defendant had by his plea alleged. At the trial at the summer assizes for York, A. D. 1743, the defendant did not appear, and the jury found that the administratrix did not make and exhibit a true and perfect inventory, &c., as plaintiff in his replication had alleged. Damages 1s., besides costs, &c. *Judgment* for plaintiff to recover the debt and damages, and costs of increase.

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and not be barred ; and the court will not presume that it would have been contested so as to prevent its being made before that event. If the defendant rested his case on his not being bound to bring in the inventory and account before a certain day, and that no court sat on that day, he should have pleaded it in excuse of performance, after craving oyer of the bond and condition (a) ; but the facts would not permit him. Though it is not the practice to bring in these accounts before they are called for, Lord *Hardwicke* in the case of the *Corporation of Clergymen's Sons v. Swainson* (b), says that nothing is more necessary than to keep executors to deliver inventories. Here it is found that the inventory and account might have been brought in on other court days occurring before the last day limited ; then the administrator was bound not to put off doing so till an impossible day.


The *Solicitor General* contra. The material question is, whether the second breach is proved ? It has been assumed that future legatees, creditors, and next of kin, are secured by the surety in the administration bond, against the insolvency or wrongful acts of the administrator, and that such a surety is liable to pay the whole damages arising to them from such wrongful acts. It is of most serious importance to consider whether their liability, in fact, exists to such an extent ; these bonds having been hitherto considered ineffectual for that purpose (c). It is here said that the whole sum sued for may be recovered as damages on the second

(a) See per Holt C. J. in *Archbishop of Canterbury v. Wills* (*Willis or Willett*), Salk. 316 ; S. C. id. 172. ; 11 Mod. 145.

(b) 1 Ves. sen. 75 ; and see 3 Merivale, 43.

(c) See a passage in page 41 of the Report of the Ecclesiastical Commissioners, intended to show that the remedy on the administration bond, in the spiritual court, is dilatory and inefficient.

breach, because the administrator was not in a condition to pay after the decree was obtained; but *The Archbishop of Canterbury v. Tappen* shows that it is no breach of the condition to retain the surplus till the decree for distribution is made.

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No breach for which the surety is liable, is assigned on the words of the statute. It does not use the words "well and truly administer" in the legal sense, so as to require proof of that receipt of assets and payment of debts in due order, which is necessary to support a plea of *plene administravit*. That, however, is not the meaning assigned to those words by the legislature, nor is misapplication of assets meant; but the bond is intended to carry into effect the statute of distributions, which provides the form of the condition (a), in order to dividing the residue among the next of kin. [*Bayley B.* There were two objects; one that the residue should be forthcoming, the other that it should be duly divided.] Nothing is said about safe custody of the assets or good conduct of the administrator, or that the bond is given to secure his general good conduct, but merely to enable that to be done which the ordinary ought to do. *Brown v. Archbishop of Canterbury in Error* (b) decided as early as 35 Car. 2. recognizes the position that truly administering does not mean payment of debts in due order, and that a *devastavit* cannot be alleged as a breach of that clause. There the plea was, that the administrator had made a true and perfect inventory of the intestate's goods, and had exhibited it in the registry of the prerogative court of *Canterbury*; and that he had well and truly administered according to law all the goods, chattels, and credits of the intestate which had come to his hands; that he had made a just and perfect

(a) See *Williams on Executors*, 905, 906.

(b) *Lutwyche*, 882, b. 883, et seq.

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account of his administration at or before the day named in the condition, and had paid and delivered over all the residue of the intestate's effects remaining on that account according to the decree of the said court, and according to the act mentioned in the condition; and that he had performed all the decrees of the said court according to the form and effect of the said condition and the construction of the said act. The replication was, that the intestate was bound by a bond to *J. H.*, which was unpaid at his death, and that effects of the intestate to a larger amount came to the administrator, from whence he might have satisfied such bond debt, and assigned a breach of the condition of administration bond that that bond debt was not paid. On demurrer, the plaintiff succeeded; but it was afterwards held on error that the breach assigned was not within the intent of the condition. Had that replication gone on to say that the administrator, having the intestate's money in his hands, refused to pay a bond debt, it would have been quite similar to this case. [Lord *Lyndhurst* C. B. How can that be reconciled with *House's* case in *Cowper*, that the creditors may sue on an administration bond?] That decision did not turn on the disposition of assets, but on the administrator's not exhibiting an inventory, as expressly directed by the condition.

Lord *Holt* says (a) that a creditor shall not take an assignment of an administration bond, and sue it and assign for breach (of the words of the condition "well and truly to administer") the non-payment of a debt due to him from the intestate, or a *devastavit* com-

(a) *Archbishop of Canterbury v. Wills*, Salk. 316, adopted by Toller in 3d edit. 496; Com. Dig. tit. Administrator (C. 3); 4 Burn's Ecc. L. 428. 430.

mitted by the administrator, for that would be needless and infinite. [*Bayley B.* Though some acts of devastavit may be committed without giving a creditor the power of suing on the bond, it does not follow that every act of that nature may, if the next of kin are affected by it. In *Folkes v. Dominique* (a) the breach assigned on a bond given by an administrator with the will annexed, was non-payment of legacies over which the spiritual court had undoubted jurisdiction; and the bond was held good at common law as to that part on which the breach was assigned; it not being within 22 Car. 2. c. 10. or 21 H. 8. c. 5.] The paying debts out of due order seems a breach of the condition "well to administer," but those words are construed merely to apply to the bringing in a true inventory and account; and an administrator is not liable on the bond for omitting to pay debts. [*Bayley B.* The stat. 22 Car. 2. c. 10. was passed for the benefit of the next of kin. Now as all the intestate's debts must be paid prior to their rights attaching, it is quite immaterial, between them and the administrator, what species of creditor he prefers. Such prior payment quoad hoc may not be a devastavit.] A temporary application of assets to the administrator's own uses is not a devastavit, if he has them when the decree calls on him to pay them over to the next of kin.


In *Greenside v. Benson*, Lord *Hardwicke* said, that a creditor might well allege as a breach that the administrator had not brought in an inventory or account, but could not allege for breach the non-payment of the intestate's debt to him (b). Lord *Tenterden*, in *Archbishop of Canterbury v. Tappen*, notices this doctrine

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(a) Stra. 1137.

(b) *Bellamy v. Alden*, Noy's R. 78. A spiritual court cannot try whether an administrator has paid a creditor his debt or not, or award payment thereof by him; but must take the account as it is sworn. See *Toller*, 495.

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of Lord *Hardwicke* as recognizing what Lord *Holt* had said, that well and truly to administer is to be construed in bringing in the administrator's account. [Lord *Lyndhurst* C. B. A distinct clause follows directly afterwards in the condition providing for that object. *Bayley* B. The words of the condition are, *and further* that the administrator shall give an account. In *The Archbishop of Canterbury v. Tappen* the administrator admitted that he had distributed the residue. There were four pleas of performance, on the three first of which no breach was assigned; the fourth was, that the administrator had not been called on by decree to pay the residue to the next of kin. The replication distinctly admitted that the administrator had paid all the debts, and alleged, not that he wasted the goods, but that he refused to pay or deliver them.]

On the first and third breaches the damages must be altogether nominal (a); then as the defendant could not plead to them in the suggestion, he must, on proving the same facts, be substantially in the same situation, and the jury who, by stat. 8 & 9 W. 3. c. 11. s. 8. are only to inquire into the truth, can only assess the actual damages. The fourth breach is virtually given up, though it is attempted to engraft it on the second. A recapitulation of the dates of the ecclesiastical proceedings will show that the breaches were not proved, for the defendant might have pleaded that no court was held on the day fixed for exhibiting the inventory and making the account. [Lord *Lyndhurst* C. B. All that the statute of *William* requires after a suggestion of breaches is, that a jury shall inquire into the truth of the breaches assigned, and not whether there is or is not sufficient excuse for

(a) But see per *Chambre J. Plomer v. Rose*, 5 Taunt. 391:

them. *Bayley B.* The acts required might have been done before the extreme day fixed.] It has been argued that the plaintiff is entitled to recover substantial damages on these breaches, because the bringing in the account and inventory caused the loss of the assets; but it is admitted that in practice neither are ever rendered till called for; and in this case a declaration containing both was afterwards delivered in instead of them, and was received without objection.

Though *Greenside v. Benson* (a) would, according to the report in *Atkins*, be in point against the defendant, as showing that substantial damages might be given on the first breach for not rendering an inventory, the lord chancellor being there made to say that the inventory and account are as to the ordinary the same thing, yet it appears from *Thomas v. Archbishop of Canterbury* (b), that on looking into the decree on *Greenside v. Benson* the report in *Atkins* was found to be erroneous, and that the administration bond was in fact held to be a security only for costs at law and in equity, and not to give the creditor any right of satisfaction on account of his debt. The personal estate was to be applied for satisfaction of the debt and costs as far as it would extend, and, if deficient, costs were to be paid by the administratrix to the extent of the penalty of the administration bond, but no further (c). No provision appears to have been there made for paying any portion of the debt remaining beyond the penalty. Suppose by negligence an animal belonging to the intestate to have been lost, and for which the administrator would be liable *de bonis propriis* (d); would that neglect be a not well and truly administering, for

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(a) 3 Atkins, 248.

(b) 1 Cox's Equity Cas. 399, 401.

(c) A similar decree was made in Chancery, 18 May 1778, in *House v. Hardy*, which is the same matter as *Archbishop of Canterbury v. House*, in 1 Cowper; *ibid*.

(d) See 2 Vernon's R. 299.

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which the surety in this bond would be liable? [Lord *Lyndhurst* C. B. Neglect to call in a debt is a similar case, and would affect the interests of the next of kin. The plaintiff will say that it is not necessary to draw the precise line, as in this case the administrator did receive the assets, and has converted them.] If any degree of damage, however small in degree, sustained by a chattel of an intestate owing to misconduct of an administrator, be an undue administration so as to charge the sureties, suits, in the words of Lord *Holt*, would be infinite.

*Kelly* in reply. The intent of the statute was, that the surplus should ultimately be distributed to the next of kin; and also that the assets, when collected, should be safely kept for them till paid by the administrator, either with or without decree. The case from *Lutwyche* shows merely that a negative act by the administrator in not paying a debt due from the intestate is no breach of the clause of the condition well and truly to administer, even assuming that sufficient assets existed. That is consistent with the cases of *The Archbishop of Canterbury v. Wills* and *v. Tappen*; whereas here the plaintiff's case rests on the flagrant malfeasance of the administrator. Then it is no answer to this action that the defendant might not be liable as surety for trifling breaches of the condition by the administrator.

*Cur. adv. vult.*

The judgment of the court was afterwards delivered by

LORD LYNTHURST C. B.—This was the case of an action brought upon an administration bond in the name of the archbishop of *Canterbury*, at the instance



of one of the next of kin, against the surviving surety. The defendant pleaded *non est factum*, upon which the plaintiff took issue and suggested various breaches, among which was one, that the administrator did not make a true and perfect inventory of the goods of the intestate; and that he did not well and truly administer those goods according to law. The facts of the case as they appeared at the trial were these: An administrator having possessed himself of the effects of the intestate to a considerable amount, applied a part of them in discharging the debts of the intestate and the funeral expenses, and another part in payment of one of the next of kin; but converted to his own use a large balance, amounting to more than 10,000*l*. He afterwards became bankrupt, and that sum of money was entirely lost to the estate of the intestate. The question under these circumstances is this—Was this conduct of the administrator a breach of the condition of the bond, by which he undertook “well and truly to administer the effects of the intestate?”

Now, looking at the language of the bond, nothing can be more clear and precise than the following terms of the condition, *viz.* “that he shall well and truly administer according to law the effects which shall come to his hands, and all other the effects of the intestate that shall come to his hands to be administered.” It would seem difficult to entertain any doubt upon the natural construction of these words, and nothing would more clearly amount to a breach of them than the application by the administrator of the effects of the intestate to his own use, and converting them to his own purposes, so that they should be entirely lost to the estate of the intestate. Considering therefore the condition of the bond according to the ordinary terms of construction, and according to the natural import

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of the words, it appears to us that this conduct of the administrator is a direct breach of the condition of the bond, and the only remaining question therefore would be, whether there is any thing in the scope and intention of stat. 22 Car. 2. c. 10., or in any of the decisions which have taken place with reference to this subject, to lead us to put upon the condition of this bond an interpretation different from that which is imparted by its ordinary terms and the language in which it is expressed.

The act of parliament called the statute of distributions, 22 Car. 2. c. 10. was passed for the purpose of facilitating the distribution of the effects of intestates, that is, the residue of their effects, amongst the next of kin; and there is nothing in the scope of that act or the subject to which it was directed, or its provisions, to lead us to the conclusion that we ought not to put upon the terms of this condition that construction which its own language naturally imports and conveys. Then, with respect to the decisions upon the subject which were relied upon at the bar, the first to which reference was made was the recent decision of *The Archbishop of Canterbury v. Tappen* (a); but it does not appear to us that there is any thing in that judgment at all altering or affecting the interpretation which we put upon this condition of the bond. The only question there was, whether the administrator was bound to distribute the residue of the testator's effects amongst the next of kin, before the ecclesiastical judge had pronounced a decree for that purpose? and the court was of opinion that he was not; they founded that decision upon the language of the condition, which is, that the administrator "shall deliver and pay all the rest and residue of the goods which

(a) 8 B. & Cr. 151.


shall be found remaining upon his account to such persons respectively as the judge of the court shall by decree or sentence, pursuant to the statute, limit and appoint." The court of King's Bench therefore was of opinion, upon the obvious construction of that clause, that it was necessary, before there could be a breach of the condition, that the ecclesiastical judge should pronounce his decree; and as that was provided for by this special clause in the condition, they were of opinion it was not a breach within the second clause in it, namely, "that he should well and truly administer according to law the goods and effects of the intestate." There is nothing therefore in the decision of that case at variance with the opinion which we have formed with respect to the construction of the condition of this bond.

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In *Brown v. The Archbishop of Canterbury*(a) the plaintiff was a creditor, and in his replication had assigned as a breach of the condition of the bond that the intestate was indebted to him by bond in a sum of 200*l.*, that assets to that amount had come to the hands of the administrator, and the bond debt was not paid by the administrator. The court of King's Bench upon demurrer gave judgment for the plaintiff; but upon a writ of error that judgment was afterwards reversed, upon the ground, as the court stated, that the breach assigned was not within the meaning of the condition. That decision, as I understand it, was, that the object of the act was not to provide a remedy for creditors, they having already by law a remedy for the recovery of their debts; and therefore that that breach so assigned was not within the intent and meaning of the statute 22 *Car. 2. c. 10.* or within the meaning of the legislature at the time they enacted that law.

(a) Lutwyche, 882, b., 883, et seq.

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Another case that was cited was *The Archbishop of Canterbury v. Wills* (a), reported in *Salkeld*, and also in *Modern*. The main question for the judgment of the court in that case was, whether the administrator was bound to make and deliver his inventory before he was cited to do so? and the court was of opinion that he was bound so to make and deliver his inventory without any previous citation. It is true that the lord chief justice *Holt*, in the course of giving judgment in that case (b) may have said, "By the words of the condition the administrator is to administer well and truly; that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a devastavit committed by the administrator, for that would be needless and infinite." What I understand to be the meaning of Lord *Holt* upon that occasion was this: that a creditor shall not sue for his own debt upon the administration bond, unless he suggests a devastavit. In the report in *Modern*, the main point also is noticed, though what Lord *Holt* is represented to have said in *Salkeld's* report of the case is not mentioned; but the interpretation which we have put upon what fell from him upon that occasion is consistent with the decision in *Lutwyche*, to which we have referred, namely, that the object of the act and of the bond is, not to provide a remedy upon it for creditors, but to take care of the effects of the intestate for the benefit of those persons who are entitled to distribution as next of kin.

The cases of *Greenside v. Benson* (c) and *Archbishop of Canterbury v. Howse* (d) were also cited. The latter was an action brought by creditors for not

(a) 1 Salk. 251, 315; and 11 Modern, 145.; S. C. (b) 1 Salk. 316.

(c) 3 Atkyns, 248.

(d) Cowp. 140.


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delivering an inventory. Those cases establish, and the practice has been consonant, that creditors may sue upon the bond where the inventory has not been delivered; but what Lord *Hardwicke* says upon that occasion confirms what was said by Lord C. J. *Holt*, and also the decision of the case in *Lutwyche*. Lord *Hardwicke* says, in *Greenside v. Benson*, (a) "what the counsel for the plaintiff aimed at would have been right, supposing the ordinary had assigned for breach the non-payment of the creditor's debts." So that all the authorities go to show that the creditors cannot recover on the administration bond by assigning as a breach the non-payment of debts due to creditors; but it does not appear to me that that decision at all affects the present question. There is nothing therefore either in the construction of the act, or in its obvious intention and import, and nothing in the cases to which I have referred at all affecting the interpretation which we put upon this condition; namely, that when the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to his estate, that is such a breach of the condition of the bond by which the administrator undertakes "well and truly to administer according to law" as will entitle the next of kin to have the bond put in suit at their instance. We are of opinion, therefore, that so far as relates to this breach the plaintiff is entitled to recover to the full amount of the money that has been so misapplied, that sum amounting in this case to 10,875*l.* 8*s.* 9*d.*

With respect to the other breaches that have been assigned, and upon which nominal damages have been assessed, the first of them is for not rendering and making a full, true, and perfect inventory of the goods of the intestate. It was suggested at the

(a) 3 Atkyns, 253.

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bar in the course of the argument, that the administrator had a sufficient excuse for not having made and returned such an inventory, because it was to be made and returned upon a particular day, and that no court sat on that day. Supposing that to be a valid and sufficient excuse, it must have been pleaded in excuse of performance, and could not have been given in evidence; and we are of opinion that in this stage of the proceedings it could not have been pleaded to a suggestion of breaches. If the defendant, instead of confining himself to the plea of non est factum (as he has done in this instance,) had thought proper to avail himself of the right which he had to plead further, he might, if this had been a valid and sufficient excuse, have availed himself of it in the shape of a plea by way of excuse of performance; but we are of opinion that he cannot avail himself of it upon this assignment of breaches; we think therefore the plaintiff is entitled to nominal damages upon this breach. The same argument and observation will apply also to the third breach, "that he did not make a true and just account of the said administration on or before the day named in the bond." In that case also, if the administrator intended to have availed himself of this excuse of performance he should have done it by plea; and we are of opinion that he cannot avail himself of this in evidence in the present stage of these proceedings.

With respect to the fourth or last breach, namely, that he should pay over the rest and residue amongst the next of kin; we are of opinion that that breach as assigned is not sufficient, because by the condition of the bond it was necessary that the decree of the ecclesiastical court should precede the distribution, whereas no decree of the court is stated in that breach. We are of opinion, under such circumstances, that there should be no damages assessed upon it, and the

course will be to discharge the jury as far as relates to it. We are of opinion, upon the whole, that the plaintiff is entitled to nominal damages upon the first and third breaches; and that upon the second and main breach, (the principal subject of argument,) he is entitled to damages to the full amount of the money that has been misapplied, namely, to the amount of 10,875*l.* 8*s.* 9*d.*

The whole sum becomes part of the effects of the intestate, and will be paid into the ecclesiastical court, which will have the jurisdiction by its decree to direct the application of the whole.

### Judgment for the plaintiff. (a)

See *Younge v. Skelton*, 3 Hagg. R. 780, cor. Sir J. Nicholl, Mich. 1831, S. C.

(a) In *Michaelmas* term 1832, *Hoggins* for the defendant had moved for a rule to show cause why the 1st and 3d breaches should not be struck out, or the defendant allowed to suffer judgment by default and pay into court 1*s.* damages thereon. He stated that the prerogative court had granted a general order to put the bond in suit solely on the ground that the administrator had not paid over the residue, and that that court had refused to rescind that order, by limiting it to a suit on the breach by non-payment of the residue.

*Bayley* B. The questions to be tried have not been limited by the ecclesiastical judge, who has on the contrary granted a general order for putting the bond in suit without limiting them. I feel great difficulty in saying that this court can restrain the plaintiff from suggesting breaches of every clause of the condition. If not suggested now they could not be suggested from time to time afterwards, nor do I know any instance in which a defendant who has pleaded non est factum only has been permitted, after suggestion of breaches on the roll, to let judgment go by default as to any of them. Such a course seems to me to be contrary to 8 & 9 W. 3. c. 11. s. 8., by which act a jury is to inquire into the truth of those breaches. Nor was the present the defendant's only course, for he might have pleaded performance, and suffered judgment by default in answer to the replication.

The other barons concurring,

Rule refused.

another course, viz. by pleading performance of the condition, and suffering judgment by default on the replication.

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Where in debt on bond a plaintiff has suggested breaches on the roll, pursuant to 8 & 9 W. 3. c. 11. s. 8. the court, after plea of non est factum pleaded, refused a rule to show cause why some of them should not be struck out, or judgment by default suffered on them with entry of nominal damages. For by that statute the plaintiff may suggest breaches on every part of the condition, and the jury are to inquire of the truth of them; and the defendant had

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HALL, Gent. one &c. *against* ASHURST, Gent. one &c.

A solicitor for the *London* creditors of a country bankrupt wrote a letter to the solicitor for the country creditors, stating, "I am willing, on behalf of the *London* creditors, to bear two-thirds of the expense of Messrs. B. & B., or such barrister as you may think fit, for resisting K.'s proof under the commission, and investigating the accounts of the assignees at the meeting on the 18th instant, and I hereby undertake to bear and pay, on behalf of the creditors, two-thirds of the expenses incident thereto accordingly. Another meeting having been appointed, the defendant declared he had no objection to bear, as before, the proportion of the expense of a barrister. Five meetings in all took place for the first-named object. Held, that the defendant was personally liable to pay two-thirds of the expenses of all the meetings.

**A**SSUMPSIT on an agreement to recover two-thirds of the expenses of five meetings before certain commissioners of bankrupt at *Bath*, which in all amounted to 93*l*. Plea, non-assumpsit. The plaintiff had been employed as a solicitor on behalf of the west of *England* creditors of the bankrupt, and the defendant in a like capacity for the *London* creditors. The bankruptcy took place in *Nov.* 1831. On 12th *Dec.* a letter was addressed by the plaintiff to Messrs. *W. & G. of London*, creditors of the estate, respecting an intended claim of 1700*l*. by one K. holding a warrant of attorney executed by the bankrupt, and on the 15th the defendant wrote to the plaintiff as follows:

"*Re Rose.*

Sir,

84, *Newgate-street, London.*

Your letter of the 12th instant to my clients, Messrs. *White & Greenwell*, has been handed to me. They are members of the City of *London* Association, and assembled with the other members, who are creditors, this morning. Your letter was laid before them, and they determined to co-operate with the other bonâ fide creditors in protecting the interests of the creditors at large, and defeating the partial purpose intended to be effected by the warrant of attorney granted to K. &c. &c.

(Signed)

*W. C. Ashurst.*

*H. W. Hall, Esq."*

It having been afterwards suggested on behalf of the general creditors, that a particular meeting of the com-

missioners of bankrupt at *Bath*, which in all amounted to 93*l*. Plea, non-assumpsit. The plaintiff had been employed as a solicitor on behalf of the west of *England* creditors of the bankrupt, and the defendant in a like capacity for the *London* creditors. The bankruptcy took place in *Nov.* 1831. On 12th *Dec.* a letter was addressed by the plaintiff to Messrs. *W. & G. of London*, creditors of the estate, respecting an intended claim of 1700*l*. by one K. holding a warrant of attorney executed by the bankrupt, and on the 15th the defendant wrote to the plaintiff as follows:



missioners should be attended by counsel, in order to oppose the abovementioned claim, the plaintiff communicated with the defendant on the subject of contributing to the expenses of so doing, the defendant wrote the following letter to the plaintiff:

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*" Re Rose.*

Dear Sir,                      84, Newgate-street, 13 Apr. 1832.

I am willing on behalf of the London creditors to bear two-thirds of the expense of Messrs. *B. & B.*; or such barrister as you may think fit, for resisting Mr. *K.*'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th instant. *I hereby undertake to bear and pay on behalf of these creditors* two-thirds of the expenses incident thereto accordingly (a).

Your's, obediently,              *W. C. Ashurst.*  
*H. W. Hall, Esq."*

The meeting on the 18th having proved insufficient for the purpose in view, it was adjourned to the 28th, which plaintiff communicated to the defendant, who thereupon wrote as follows:

*" Re Rose.*

84, Newgate-street, London,

Dear Sir,                                      26 Apr. 1832.

I shall have no objection to bear, as before, the proportion of expense of the barrister attending the meeting stated in your letter.

Your's &c.                      *W. C. Ashurst.*  
*H. W. Hall, Esq."*

The investigation not having been concluded at the second meeting, three more meetings took place, and about 900*l.* of the amount claimed by *K.* was finally struck off by the commissioners.

(a) The rest of the letter is immaterial to this report.

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At the trial before Lord *Lyndhurst* C. B. at the sittings at *Guildhall* after last term, the above letters were proved, and the plaintiff had a verdict for 61*l.*, but the defendant had leave to move to enter a nonsuit, on the ground that the defendant undertaking to pay did not bind him personally.

*Talfourd* Serjt. obtained a rule accordingly; but the Court refused to grant it in the alternative for reduction of damages to 21*l.*, on the ground urged by him, that the defendant's liability did not at all events exceed the expenses of the first two meetings; saying that the first meeting was adjourned in the first instance, and that it was afterwards extended to five meetings, in order to accomplish the same object, and that if the defendant was liable for any part there were no circumstances to show him not liable for all.

*Ball* (*Bompas* Serjt. with him).—An agent may contract so as to bind himself personally, and this defendant has done so here. In *Burrell v. Jones* and Another (*a*) the solicitors for the assignees of a bankrupt tenant undertook, "as solicitors to the assignees," to pay the landlord his rent due, and were held personally liable. That case was declared by the court in *Iveson*, one &c. v. *Conington*, one &c. (*b*) to be not distinguishable from the case before them, though the agreement there was expressed to be a personal undertaking to withdraw the record entered into by the parties as attorneys on both sides. *Appleton v. Binks* (*c*) is relied on by Lord *Tenterden* in *Burrell v. Jones*, and decided that one who covenanted for himself, his heirs, executors, and assigns, for the act of

(*a*) 3 Bar. & Ald. 47.

(*b*) 1 B. & Cr. 160, 162.

(*c*) 5 East, 147.

another, was personally bound by his covenant, although he described himself in the deed as covenanting "for and on the part and behalf" of such other person. In this case the undertaking "on behalf of the *London* creditors," merely showed the character in which the defendant acted. He also cited *Scrace*, gent. one &c. v. *Whittington*, gent. one &c. (a). [*Bayley* B. That case turns on the usage of the profession of attornies, who when employed by other attornies look to them for payment, and not to the clients of those others. And the jury found that the credit was given to the defendants, and not to their principal and client. In that case the name of that principal had been all along known to the plaintiff; and the court say, "if an attorney in such a case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done on the credit of the client." In this case the names of all the creditors, the defendant's principals, are not disclosed to the plaintiff, though they might have been known after the issuing of the commission in *November*.]

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*Talfourd* Serjt. and *Hoggins* contra. The question is, whether the words of the defendant's undertaking amount to a personal contract by him on behalf of his clients, and whether the words "on behalf of the *London* creditors" are merely words of description or casting a responsibility on the defendant who used them. Now Messrs. *White* and *Greenwell*, two of the creditors of the bankrupts, were in the first instance addressed by the plaintiff, and have been named in the defendant's letter of 15th *Dec*. [*Lord Lyndhurst* C.B. His letter of 13th *April* introduces the aggregate body of the *London* creditors as his principals, in order to

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point out the proportion of the expenses which they might be reasonably called on to pay. The words in that letter "I am willing on behalf of the *London* creditors to bear;" "I hereby undertake to bear and pay on behalf of these creditors;" are like the expressions in the letter of the 26th *April*, "I shall have no objection to bear the proportion of expense." The only question in *Iveson v. Conington* was the extent of the liability, which was confessed to exist on a personal undertaking by the defendant to withdraw a record. The ground of the decision in *Burrell v. Jones* appears to have been the expression "as solicitors," which distinguishes that case from the present. That undertaking either amounted to a personal security by those solicitors, or no effect could be given to it; for *Holroyd J.* declares it to be clear, that their clients the assignees were not bound by it.

Lord LYNDHURST C. B.—I am of opinion that the defendant's undertaking was not merely on behalf of the *London* creditors of the bankrupt, but that it is a special undertaking by him in his own personal character to bear and pay, on their behalf, the expenses of a particular defined object; that is, to do an act on their behalf. There is no inconsistency in a party's covenanting to do something himself for another person, his principal. I understand Lord *Tenterden's* opinion of the case of *Appleton v. Binks*, as expressed by him in *Burrell v. Jones*, to have been similar. In the present case it appears to me that there was nothing inconsistent in this attorney's having subjected himself, on behalf of his client, to the personal liability contended for; and I think that the terms of the agreement are expressed with sufficient precision to include such a liability. *Burrell v. Jones* applies; for it turns

more on the situation and character of the defendants as solicitors, than on their having been expressed to be such in the terms of their undertaking. The terms of the defendant's undertaking impose this liability on him. Besides which it is more probable that this contract between one solicitor and another should be acted on by the plaintiff as being with the defendant, and not the body of the bankrupt's *London* creditors. But the ground of my judgment is, that the defendant's letters of the 13th and 26th *April* contain precise words showing the contract to be personal by the defendant to bear two-thirds of the expenses, and not by him on behalf of others. Nor is there evidence here to show that the act of the defendant in giving this undertaking was done by the authority of the *London* creditors (a).

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BAYLEY B.—The construction of the language used by the defendant would be, that he bound himself as paymaster for the *London* creditors: and if that were equivocal, the words “ I undertake to bear and pay on behalf of these creditors,” make the defendant liable. That meaning is consistent with reason; because the plaintiff might know who the defendant was, and the defendant, as solicitor to some of the creditors, might know the persons on whose behalf he undertook, though, whether solvent or not, they might be strangers to the plaintiff. *Burrell v. Jones* is not materially distinguishable from this case.

VAUGHAN B.—The question is, what is the reasonable construction of the language of the letters of the 13th and 26th *April*, and whether the intention of the parties can be gathered from the whole of them to

(a) See *Johnson v. Ogilby et al.* 3 P. Wms. 277:

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have been to charge the defendant personally. It seems that the plaintiff must have considered that it was, for it does not appear that he knew any other persons against whom a remedy could be obtained, and after the defendant's first letter he communicated with the defendant only on the subject of the expenses, and gave the credit to him alone.

. BOLLAND B.—This appears to me to be a personal undertaking by the defendant to pay.

Rule discharged (a).

There being six special counts, one for attending all the meetings, and each of the other five for attending one meeting, it was afterwards moved that the plaintiff do elect on what count to take his verdict. And *per Curiam*—Had it been necessary to declare specially on the undertaking, we should not have confined the plaintiff to one count; but here the cause of action was for work and labour in attending the meetings, and the sole question was, whether the defendant was liable or not. If liable, the plaintiff could have recovered on the common count for work and labour and money paid; and there could be no objection to the absence of a special count.

The Court, however, allowed the verdict to be taken on one special count, and on the common count.

(a) See *Cayhill v. Fitzgerald*, 1 Wils. 28, 58; *Norton v. Heron*, Ry. & M. 229; *Cass v. Ruddle et. al.* 2 Vernon, 280, Edit. 1806; see note to *White v. Nutt*, 1 P. Wms. 61, 62, 2 id. 220; 2 Atkins, 490; *Bowen v. Morris* in Error, 2 Taunt. 374; *Spittle v. Lavender*, 2 Brod. & B. 452.

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ALSTON *against* UNDERSHILL.

**T**HE defendant having been arrested on the 1st of

*April*, a bail bond to the sheriff was executed. As the eighth day fell on *Easter Monday* (being a day between the *Thursday* before and the *Wednesday* after *Easter Day*), the plaintiff could not go on with the proceedings to judgment and execution, at the expiration of *Wednesday* the 10th, that day being by stat. 2 W. 4. c. 39. s. 11. the uniformity of process act, to be considered the last of such eight days. On the 10th of *April* a writ was issued against the bail on the bail bond, and was served on the 11th. On the 11th bail above were put in at chambers, and notice of the justification was given. On the 16th, after they had justified, a rule was granted calling on the plaintiff to show cause why the proceedings on the bail bond should not be set aside for irregularity, on the ground that the writ in the action on the bail bond had been issued too soon.

*Erle* showed cause. The question is, whether the defendant had the 11th *April* in which to put in special bail, so as to prevent the plaintiff's proceeding on the bail bond, by serving on that day a writ issued on the 10th? It is true, that by *Reg. Gen. Easter* 1832, the days between the *Thursday* next before and the *Wednesday* next after *Easter Day* shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial and notices of inquiry in any of the courts of law at *Westminster*. But by sect. 11 of 2 W. 4. c. 39. the uniformity of process act, which came into operation on the 2d Nov. 1832, "if any writ of summons, capias, or detainer, issued by authority of this act, shall be served or executed on any

Since 2 W. 4. c. 39. the commencement of an action takes place at the issuing the writ of summons. Therefore where a plaintiff having taken an assignment of a bail bond, sued out process thereon against the bail, on the day with which the time for putting in bail above expired, the proceedings were set aside for irregularity with costs, as premature, the cause of action not having accrued till the next day; and the circumstance that the writ against the bail was not served till the 11th made no difference.

The *Reg. Gen. Easter* 2 W. 4. [1832], as to the days between the *Thursday* before and the *Wednesday* next after *Easter Day* is altered by stat. 2 W. 4. c. 39. s. 11.

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day, whether in term or vacation, all necessary proceedings to judgment may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation. Provided always, that if the last of such eight days shall happen to fall on any day between the *Thursday* before and the *Wednesday* after *Easter Day*, then in every such case *the Wednesday after Easter Day shall be considered as the last of such eight days.*" This case falls within that clause, for the *Wednesday* after *Easter Day* was the 10th *April*, and the plaintiff might issue a writ against the bail on that day, as he did not serve it till the 11th; and they are now only bound from the date of that service. The plaintiff may sue out the writ, and wait till the cause of action accrues before he puts it in force. A writ of summons only operates from the service, except that if a plea of the statute of limitations is pleaded, the time of its issue, like that of a latitat formerly, becomes material to be replied.

[*Bayley* B. The action is commenced not by the service, but by the suing out of the writ of summons, which here took place on the 10th.]

In the note to *Mellor v. Walker*, 2 *Saund.* 1 d. *Serjt. Williams* says: "In general cases the bill is the commencement of the action, and the latitat is only to bring the party into court; and in that view it is held that a latitat may be sued out before there is any cause of action." [*Bayley* B. That was to enable the plaintiff to give in evidence any cause of action which arose between the service of the writ and the bringing the bill into court. The necessity for that is at an end now.] *Best v. Wilding* (a) shows that the filing the bill was the com-



mencement of the action, even where the process had been bailable, so as to let in evidence of a cause of action arising before the bill was filed, though after the writ sued out.

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BAYLEY B —Since the late act 2 W. 4. c. 39. s. 11. the suing out the writ of summons is the commencement of the action, and the general rule cited has ceased to operate. Though an assignment of the bail-bond may be taken directly it is executed, it cannot be acted on (a) till the time for putting in bail is expired. That was so by the former law, and is not altered by the new act. As the time for putting in bail above expired on the 10th, the cause of action on the bail bond did not arise till the 11th. The writ was therefore sued out against the bail too soon on the former day.

VAUGHAN, BOLLAND, and GURNEY B.'s concurred.

Rule absolute, with costs.

(a) See *Woomam v. Price*, ante, 375.

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BARDONS and Another against SELBY, Esq.

(In Error from the King's Bench.) (a)

Before TINDAL C. J.—A. PARK, BOSANQUET, and ALDERSON, Justices.—BAYLEY, VAUGHAN, and BOLAND, Barons.

An avowry stated that the plaintiff was an inhabitant of a parish and rateable to the relief of the poor in respect of his occupation of a tenement situate in the place in which &c.;

that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*; that he had notice of the rate and was required to pay, but refused; that he was duly summoned to a

petty sessions to show cause why he refused; that he appeared and showed no cause; whereupon a warrant was duly made under the hands of two justices of peace, directed to one of the defendants, requiring him to make distress of the plaintiff's goods; that the warrant was delivered to the defendant, under which he, as collector, justified taking the goods as a distress and prayed judgment and a return.

Plea in bar *de injuriâ sua propriâ absque tali causâ*.

Special demurrer, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not as a justification and claim of right.

Held, that the plea in bar was good.

**REPLEVIN.** The court of King's Bench having in *Hilary* term 1832 given judgment for *Selby*, the plaintiff below, and in favour of the pleas in bar, Lord *Tenterden* C. J. dissentiente, a writ of error was brought by *Bardons* and *Jenkins*, the defendants below, and was elaborately argued in the vacation after last *Hilary* term, by *Coleridge* Serjt. for the plaintiffs in error, and by *W. H. Maule* for the defendant in error.

The pleadings being stated in 3*d Barnewall* and *Adolphus's* K. B. Reports, p. 2, are not here repeated, and the judgment renders it unnecessary to report the arguments at length.

The following authorities were discussed:—*Crogate's* case, 8 *Coke*, 132; *Archbishop of Canterbury v. Kemp*, C o. Eliz. 539; Year Books, 14 *H. 4.* pl. 45, folio 32; 19 *H. 6.* pl. 14, fol. 7, A. 12 *Ed. 4.* 10 b.; 16 *Ed. 4.* pl.

(a) See *Pigott v. Kemp* and others, *ante*, 128.

10, fol. 4; 16 H. 7. pl. 7, fol. 2 b.; *Chancey v. Winn and others*, 12 Mod. 580; *Taylor v. Markham*, Cro. Jac. 224; *Cooper v. Monke*, Willes, 54; *Fursdon v. Weeks*, 3 Levinz, 65; *Cocherill v. Armstrong*, Willes, 100; *Bell v. Wardell*, id. 204; *Jones v. Kitchen*, 1 Bos. & P. 76; *Finch's Law*, 396; *Potter v. North*, 1 Saund. 347 b.; and *Aylin v. Hazell*, K. B. sittings in banc after *Trinity* term 1824, cor. *Bayley*, *Holroyd*, and *Littledale J.'s*, in which *Hobart* 76, Com. Dig. tit. Pleader (B. 20) were cited.


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*The Court* took time to consider their judgment, which was afterwards delivered in this term by

TINDAL C. J.—This question, raised for our consideration upon this writ of error, arises in an action of replevin, in which *Bardons*, one of the defendants below, avows as collector of a poor rate, and *Jenkins* the other defendant makes cognizance as his bailiff, alleging in the 4th avowry and cognizance, that the plaintiff was an inhabitant of the parish, and by law rateable to the relief of the poor thereof, in respect of his occupation of a tenement situate within the same; that a rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes, and that by the said rate the plaintiff was duly rated in the sum of 7*l.*; that *Bardons* as collector gave him notice of the rate and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions to be held at a time and place duly specified, to show cause why he refused; that he appeared and showed no cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then pre-

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sent, directed to *Bardons* the collector, commanding him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to *Bardons*, under which he as collector avowed, while the other defendant acknowledged the taking of the goods, praying judgment and a return &c. The plaintiffs pleaded in bar, that the defendants of their own wrong, and without such cause as was alleged, took the plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause that the plaintiff by his plea in bar sought to put in issue several distinct matters, and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same and claim a return. The plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers and joinders in demurrer. Upon argument before the court of King's Bench, judgment was given in favour of the plaintiff below by two of the learned judges of that court, the late learned and much-lamented chief justice, Lord *Tenterden*, having given judgment in favour of the defendants; and the question raised upon the record for determination is this. Whether the general plea in bar pleaded by the plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not? and we are all of opinion that such plea in bar is a good plea, and that the judgment of the court below must be affirmed.

It may be convenient, in the first place, to advert to the objection which relates to the form of action in which this general plea is used; namely, that it is in point of form an action of replevin, not an action

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of trespass; as to which we are of opinion that no sound distinction can be made in that respect; but that wherever the facts pleaded in bar to an action of trespass for taking goods constitute such a defence, that the plaintiff may, consistently with the rules of law, put the whole of them in issue by the general replication *de injuriâ suâ propriâ absque tali causâ*; we think the plaintiff may also do the same in his plea in bar to an avowry, stating the same identical facts as a defence in an action of replevin. No case has been cited before us in which such general traverse of the facts stated in the avowry has been held bad, simply upon the ground that the form of action is in replevin not trespass. For as to the case of *Jones v. Kitchen* (a), the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special plea in trespass, stating the same facts, as appears from the case of *White v. Stubbs* (b). It cannot therefore, as it appears to us, be a safe ground of decision to rest the validity of the general traverse on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question whether they constitute one single defence or not, but upon the consideration that the question arises in an action of replevin. The only ground of distinction that has been suggested is, that the defendant in this case, by claiming a return of the goods, asserts a right and property in them, and therefore brings the case within the exception in *Crogate's case*, "that the defendant claims property on an interest in or out of the goods which have been taken." But

(a) 1 Bos. &amp; P. 76.

(b) 2 Saund. R. 294.

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upon reference, as well to *Crogate's* case, where this exception to the general rule is laid down, as also to the several cases in which such exception has been held to apply, we think it is limited to instances in which the defendant has claimed by his plea an interest in the land or goods, before and at the time of the trespass complained of. In replevin, however, it is obvious that the defendant does not insist, in ordinary cases at least, and certainly not in the present case, upon any right or interest he possessed in the goods, before the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that he has seized the goods which belonged to his tenant the plaintiff; his sole object being to satisfy the rent out of the tenant's property, and the prayer for a return of the goods &c. is no assertion of right to, or interest in the goods, in himself the defendant, but is a prayer that the *plaintiff's* goods may be returned by the sheriff, in order, so long as the common law on this subject continued, that they might be kept by the defendant as a pledge for the payment of the rent, and since the alteration of the common law by the statute 2 *W. & M. c. 5.* in order that they may be sold by the defendant in satisfaction of the arrears of rent and the expenses. Indeed it is evident that the claim of interest mentioned in *Crogate's* case as forming an exception to the application of the rule there laid down, must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put, of a right of common, or a right of way or passage, and the like, all of which from their nature must have existed in the party before the trespass was committed for which the action is brought; we think therefore no distinction can be satisfactorily laid down between the rule of pleading

as to the point in question, in an action of replevin and an action of trespass ; but that the point to be determined is, whether by the rules of pleading the several facts alleged in the 4th avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass ?

And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact ; yet we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in late times, and we feel ourselves on that account bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedent than by general principles of law.

It is not necessary to refer to any earlier decision than that of *Crogate's case* (a), as an authority upon the present question. Indeed the *Year Books* cited in that case do not, upon reference, throw much light or any degree of certainty on the points there resolved. But from the time of *Crogate's case* (6th *James* 1) down to the present period, the resolutions of the court made in that case have as to the greater part been considered to be law.

In *Crogate's case*, the defendant in an action of trespass for driving the cattle of the plaintiff, pleaded a right of common in a copyholder over the locus in quo, by prescribing in the usual way in the name of

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the lord of the manor ; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied, *de injuriâ suâ propriâ absque tali causâ* ; and upon demurrer it was adjudged that the general replication in that case was insufficient ; and Lord *Coke* then proceeds to lay down four resolutions of the court, in the course of which he thus states the nature of this general plea, *viz.* "The general plea *de injuriâ suâ propriâ*, &c. is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever."

The resolutions of the court are these four, 1st. That *absque tali causâ* doth refer to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. 2dly. It was resolved, that when the defendant in his own right, or as servant of another, claims any interest in the land, or any common, or rent going out of the land, &c. there *de injuriâ suâ propriâ*, &c. generally is no plea ; but if the defendant justify as servant, there *de injuriâ suâ propriâ*, &c. in some of the cases, with a traverse of the commandments, that being made material, is good. 3dly. It was resolved, that when, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ* ; the same law of an authority given by law, as to view, waste, &c. Lastly, it is resolved, that in the case at bar the issue would be full of multiplicity of matter where an issue ought to be full and single ; for parcel of the manor demisable by copy, grant by copy, prescription of common, &c.



and commandment, will be all parcel of the same. The questions therefore appear to us to be these two alone ; First, whether the facts pleaded in the avowry bring it within that description of plea to which the general replication is admitted in *Crogate's* case to apply ? and, Secondly, whether the case falls within any of the exceptions laid down by the court in their resolutions in that case.

Now the facts stated in the avowry are, the inhabitancy of the plaintiff in a certain parish, and his liability to the poor rate by reason of occupation ; the making of a poor rate for the parish, with all the particular observances required by law ; notice of the rate ; the demand of payment and refusal to pay ; the summoning before the justices of peace in petty sessions to show cause for his refusal, where no cause was shown ; the issuing of a warrant by the justices of the peace ; the delivery of the warrant to one of the defendants, and the distress made by him and the other defendant as his bailiff. In the first place these facts appear to us, in the language of *Crogate's* case, to consist merely " upon matter of excuse, and of no matter of interest whatsoever." They fall within the principle of a justification under a proceeding in the admiral's court, the hundred or county court, or any other which is not a court of record, where *de injuriâ &c.* generally is good, " for all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to ; a justification under a distress warrant for a poor's rate must surely be the subject of general traverse ; if a justification under the process of the admiralty court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of

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the exceptions which are laid down in the leading case above referred to. The first is where the defendant in his own right, or as servant to another, claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, licence, or gift from the plaintiff; (*Bro. Abr. tit. De son tort demesne*, 41; or any subdemise to the defendant (*id.* pl. 53.) The answer therefore to this objection appears to be, that the defendants in this case claim no sub-interest, nor any other interest of any kind, in the goods taken. For that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our opinion, to which we refer. The next exception is where the defendant justifies under any authority or power, mediately or immediately derived from the plaintiff; in which case it is said, that although no interest is claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. It would not have been necessary to have adverted to this exception, as the proceedings on the part of the defendants are manifestly not under any authority from the plaintiff, but directly against him; if Lord Coke had not proceeded to add "the same law of an authority given by the law, as to view waste." But the meaning of this distinction is explained by Lord Holt in the case of *Chancey v. Winn* (a), who says, "the case of entering to see waste is upon a special reason, for suppose the lessor were seised in fee, such seisin in fee would be involved in the issue." That the dictum of Lord Coke cannot be intended of justification under *all* authorities in law generally, is abundantly

clear from the instances already adverted to of justification under process of law against the person and against the goods of the plaintiff, so also of justification by peace officers arresting upon breach of the peace and the like. So also in the case of justification under a statute, (see *Chancey v. Winn*, *suprà*;) in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it not equally be replied where the justification is under a distress for a poor's rate being an authority of law?

The last of the exceptions mentioned in *Crogate's* case is, that the plea would be full of multiplicity of matter. Whether this is or is not a ground of exception that applies to the present case, must depend upon the meaning of the word "multiplicity" in the resolution. If it intends that separate and distinct facts constituting altogether one defence, cannot be included in the general replication, what becomes of the rule in *Crogate's* case altogether? why did the discussion in *Crogate's* case take place? and why were the four resolutions made, when the single objection that the plea included more than one separate fact would have been sufficient to have determined against the general traverse? How is this interpretation reconcileable with the various instances in which this general form of replication is confessedly held good, such as the justification under process issuing out of a court not of record? Where facts are stated in the plea mixed up with matter of record, or with the claim of interest, or under the authority of the plaintiff, it has always been allowed that the plaintiff might admit the fact which falls within the description of such exceptions, and traverse the remainder of the allegations of the plea by uniting the traverse by the words "absque residuo causâ." How could this practice of

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pleading be applied to the present case, when none of the facts alleged fall within the exceptions, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word "multiplicity," and consequently that the resolution does not apply to this case. And such appears clearly to have been the opinion of the court of King's Bench in two modern cases, *Robinson v. Raley* (a), and *O'Brien v. Saxon* (b).

Upon the whole, we think this case falls within the general rule laid down in *Crogate's* case, and that it is not touched by any of the exceptions there adverted to, and consequently that the judgment of the court below must be affirmed.

Judgment affirmed.

(a) 1 Burr. R. 316.

(b) 2 B. & Cr. 908.

**The KING against The Sheriff of Middlesex in
DUNCOMBE v. CRISP.**

Informality in the notice of bail does not justify a plaintiff in treating it as a nullity, and issuing an attachment against the sheriff.

THE notice of bail being informal the plaintiff treated it as a nullity, and issued an attachment against the sheriff. A rule having been obtained to set it aside without costs, cause was shown that the attachment was regular in the absence of a proper notice of bail. But

Per Curiam.—The informality in the notice did not render it a nullity for this purpose.

Rule absolute as prayed.

Price for, *Erle* against the rule.

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SIDDALL *against* JOHN RAWCLIFFE.

ASSUMPSIT on a joint and several promissory note for 100*l.*, dated 12 *December* 1825, made by the defendant (and others not sued), and payable on demand to the plaintiff or order, with lawful interest. Plea non-assumpsit. The particulars of demand were for 19*l.* 10*s.* the balance of the principal, and interest due on the note.

The plaintiff was treasurer and trustee of a money-club (or commercial and building society), held at his house at *Meltham* in *Yorkshire*. He was not a member. The defendant was *John Rawcliffe*, one of the makers of the note sued on, as surety for his brother *Samuel*.

The club was formed on the 7th *December* next before the making of the note, by some inhabitants of *M.*, who agreed to form a fund by making quarterly contributions of 2*l.* 2*s.* for each nominal share of 100*l.* As soon as the quarterly contributions form a sufficient fund, any member who wishes to take out his share of 100*l.* and will pay the highest premium for so doing, receives the 100*l.* (deducting the premium) upon giving a joint and several promissory note for that sum, with lawful interest, on demand, signed by him and his sureties. The intention of taking the note is only to secure payment of the quarterly contributions and interest, and the fulfilment of the rules of the society, till the termination of the club by every individual member having drawn and received his share.

Samuel R., brother of defendant, having subscribed to the club for two shares, one of 100*l.* the other of 50*l.*, and purchased the right of receiving his share of 100*l.*, received it on paying a premium, and giving the

A promissory note in the common form, but expressed to be payable on demand, was given to the trustee of a building club, in order to secure the payment, by the maker or his sureties, of certain quarterly contributions, payments of interest on money lent, and fines during a certain period. Arrears having become due, an action was brought on the note, and a cognovit was given for the amount then due and costs, being together less in amount than the sum in the note. That amount was paid with costs, and a receipt given expressed as being "in discharge of the debt and costs in that action." Another action having been brought on the

same note for similar arrears subsequently becoming due, held that it could not be maintained.

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note sued on, with the defendant and two others, as his suitors.

He continued to pay the quarterly contributions, interest, and forfeits, agreeably to the rules of the club, till 1829, when he became in arrear; and in *Michaelmas* 1830, an action was brought against him as well as the present defendant and another of his sureties, by the plaintiff, to recover 17*l.* 18*s.* then due for quarterly contributions, interest, and fines for not making regular quarterly payments. Just before the *Lent* assizes 1831, the present defendant offered to give his cognovit for debt and costs payable in *May* following; and it was accepted, payable 23*d May*, provided that the defendant would add to the sum originally sued for, three quarterly contributions accruing due since the action brought, and before the latter date. The cognovit was accordingly given in that cause in the following terms:—

I *John Rawcliffe*, one of the above-named defendants, do confess this action, and that the plaintiff hath sustained damages to the amount of 200*l.*, besides his costs and charges as between attorney and client, to be taxed by the master; but no judgment is to be entered up or execution issued, till 23*d May* next, in default of payment of the sum of 28*l.* 17*s.*, being the debt in this action, *together with the said costs*; and I do hereby agree that no writ of error shall be brought, or bill in equity filed, to hinder or delay the said plaintiff from suing out execution as aforesaid; and that in case the plaintiff shall enter up his judgment in default of payment, he shall be at liberty to levy the said sum of 28*l.* 17*s.*, together with the costs, sheriff's poundage, and all other incidental expenses. Dated 12 *Feb.* 1831.

Witness, &c.

Signed, *John Rawcliffe*,
(the defendant.)

The following receipt was afterwards given by the plaintiff's attornies. "Received the 31st May 1831, of Mr. *John Rawcliffe*, one of the above-named defendants, the sum of 40*l.* in discharge of the debt and costs in this action."

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No judgment was ever entered up on the cognovit.

The defendant's note still remained in the plaintiff's possession (a), and the present action was brought on it to recover the subsequent five quarterly contributions and interest subsequently accruing due, viz. from June 1831 to 5 Sept. 1832, 6*l.* 15*s.*, with 3*l.* 16*s.* for fines for non-payment at the quarter days. *Alderson J.* nonsuited the plaintiff at the last assizes for *Yorkshire*, on the ground that the defendant's liability on the note was discharged after the cognovit payment and receipt in the former action; but gave leave to move to enter a verdict for 16*l.* 15*s.* or 20*l.* 1*s.*

Alexander moved accordingly. Judgment never having been entered up on the cognovit, it could not be pleaded in bar, *Hitchin v. Campbell* (b). It therefore remained open to the plaintiff to explain by parol evidence, that the cognovit payment and receipt only applied to arrears sued for in the former action. The plaintiff could not in the first action sue for the whole sum secured by the note, but only for the arrears then due.

LORD LYNTHURST C. B.—This is a simple promissory note made in the common form, and without qualification. Your object is to make it of another character and description. But that cannot be done

(a) *Brombridge v. Osborne*, 1 Stark. R. 374; *Buzard v. Flecknoe*, id. 323.

(b) 3 Bla. R. 429.

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by parol evidence. One action was brought upon it, and in that action so brought a cognovit was given for debt and costs. That was still a debt upon the note. It is said that the debt was secured by it, but it was necessary to sue upon it. Then an action having been brought on a promissory note in the common form, and money having been paid in satisfaction of it, how can a second action be brought on the same note? It could only be once sued on, and if it was intended to be an instrument of continuing guarantee, that should have been so expressed on the face of it.

BAYLEY B.—The right to sue on this note was entire, and when once sued on, it was satisfied. It is urged that the receipt was only given in discharge of the debt sued for in the first action, and the costs of that action; but that is saying, that having sued on the note for one sum, you might bring a second action upon it to recover another. But though it was open to the plaintiff to explain, he could not contradict by parol the terms of the cognovit and receipt, which describe 28*l.* 17*s.* to be the whole debt due. The plaintiff could never have had more than one remedy on the note. Though the judgment was never formally entered up, the plaintiff got the benefit of it by payment. For a cognovit was given with all its incidents, one of which was that judgment might be entered on it. Had it been so entered up, the original claims would have merged in that judgment, and the plaintiff could not have sued on the original security. Had execution issued, restricted to 28*l.* 17*s.* only, which might be the arrears then due, that would nevertheless have been satisfaction of the whole note. It may have been that the cognovit would not have been given unless the note had been extinguished, as it would have been, by a judgment. This note is not

payable by instalments, which might be sued on as they become due, but in the common form, on which there was only one remedy by action. That remedy has been taken; a cognovit has been obtained describing the debt to be 28*l.* 17*s.*, and a receipt has been given for the debt and costs in that action. It is difficult to say that that was not the amount of the debt due on the note and of the costs. Nor can oral testimony be admitted to avoid that difficulty by contradicting the note, cognovit, and receipt.

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BOLLAND B.—A new security should have been obtained to provide for the further arrears.

GURNEY B. concurred.

Rule refused.

BRIGSTOCKE *against* SMITH.

ASSUMPSIT for work and labour, with the common counts; and on an account stated. Pleas, non-assumpsit and the statute of limitations. To avoid the effect of the latter plea, the plaintiff relied on the following letter from the defendant.

" Margum Tin-works, January 28, 1831.

" Messrs. George and Amlet.

*" Gentlemen,—In reply to your application of the 19th instant for the payment of 89*l.* 10*s.* 11½*d.* to Mr. D. Brigstocke, I beg to say it is a claim I am by no*

The operation of the statutes of limitations will not be barred by a written acknowledgment of a pre-existing debt, unless a fresh promise to pay it can be inferred from the terms used. Held, that a letter from a defendant denying his lia-

bility to pay the plaintiff's claim, and containing no acknowledgment of its validity, though pointing out a time for communicating personally with the plaintiff about it, did not take a case out of the statute, and that a nonsuit was right. *Seemle*, part payment will not bar the interest, where the debt to which it is applied consists of several items.

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means prepared to admit to the full extent, and to make the following observations respecting it. Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished between the years 1817 and 1824, a period during which I was concerned in two successive partnerships; to one or other of which the amount Mr. *B.* was entitled to receive ought to have been charged.

“ Having at different times wound up both those concerns, and quitted *Carmarthen* so long back as the year 1824, I was surprised to receive Mr. *B.*'s bill in 1829, five years afterwards; and it is certainly not a little strange that he should then send in a charge of so old a date, when, if any amount was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot therefore allow that I am liable to pay any part of the amount previous to the year 1825; but as I anticipate being in *Carmarthen* shortly, I will then communicate with Mr. *B.* personally respecting it.

“ The remainder of the amount is for repairs, ordered by an agent under the late firm of *Robert Smith* and Co., to be done at the works at *Carmarthen* in 1827, together with a few items for glazing in the year 1825, making together 20*l.* 17*s.* 5*d.*, which I believe to be correctly charged, and for which I enclose a check, and will thank you to acknowledge the receipt of it.”

(Signed by the defendant.)

At the last *Lent* assizes for *Carmarthen*, *Patteson J.* nonsuited the plaintiff, giving him leave to move to enter a verdict for 68*l.* 3*s.* 8*d.*

John Evans now moved accordingly. It appears

from the judgment of C. P. in *Haydon v. Williams* (a), that stat. 9 G. 4. c. 14. does not alter the legal construction to be put on acknowledgments or promises made by defendants, but merely to require a different mode of proof by writing, signed by the party chargeable. That being so, and this instrument being in writing, the former decisions apply, and it is necessary to inquire whether the words of the letter produced in this case would before that statute have amounted to an acknowledgment or new promise, if written or spoken by the defendant. Several cases appear to show that if a party does not deny the debt to exist, or speaks ambiguously about it, but says that it is discharged by lapse of time, it should be left to the jury to say whether it amounts to an acknowledgment of the debt, so as to take it out of the statute of limitations, *Lloyd v. Maund* (b). Lord *Ellenborough*, in *Birk v. Guy* (c), says that the case meant to be protected by the statute was that where a man had lost his evidence of payment. *Colledge v. Horn* (d) turned on these words of the defendant, "I have received yours respecting the plaintiff's demand, it is not a just one; I am ready to settle the account whenever the plaintiff thinks proper to meet on the business. I am not in his debt 90*l.*, nor any thing like that sum:—shall be happy to settle the difference by his meeting me." [Bayley B. That letter acknowledges something to be due, and promises to settle the difference on meeting the plaintiff. *Lloyd v. Maund* amounts to this, I know I owe the debt, but I will not pay it, or promise to pay it.] Here the language of the defendant's letter rather denies his liability to pay.

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(a) 7 Bing. 163, 166, et seq.

(b) 2 T. R. 760.

(c) 4 Esp. 185, 6 Esp. 66. See Holt, 185.

(d) 3 Bing. 119.

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Defendant has insisted he is no longer liable to pay; but the question is, whether he has not admitted a debt to exist? and if he has, the cause is taken out of the statute. *Bryan v. Horseman* (a), *Clark v. Bradshaw* and *Coghlan* (b) show that a general acknowledgment of a pre-existing debt will create an assumpsit to pay it, so as to take the case out of the statute (c). Nor can the acknowledgment be taken separately from the promise, but both together.

The payment of 20*l.* 17*s.* 5*d.* for items of glazing done in 1825, is a part payment within 9 G. 4. c. 14. s. 1.

BAYLEY B.—As to the last point, though part payment might have taken the case out of the statute had the debt been entire, it has not that effect where the account contains separate items.

On the main point, I believe the invariable construction put by the late cases upon the stat. 9 G. 4. c. 14. to have been, that the plaintiff's claim is barred, unless an acknowledgment has been made by the defendant in such terms, that a promise by him to pay the debt so acknowledged may be inferred from them. In *Kennett v. Milbank* (d) that opinion is distinctly intimated by a part of the court; and the same may be collected from *Haydon v. Williams* (e), where the acknowledgment of a debt due was distinct, but the promise to pay it was not absolute like that declared on, but qualified and contingent. *Tanner v. Smart* (f) shows that the true principle on which an acknowledgment of the debt is an answer to the statute of

(a) 4 East, 599.

(b) 3 Esp. C. N. P. 155, 157.

(c) See as to the above cases, 6 B. & Cr. 605, 607.

(d) 8 Bing. 38. Mich. 1831.

(e) 7 Bing. 163. Mich. 1830.

(f) 6 B. & Cr. 603.

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mitations, is, that the acknowledgment is evidence of a new promise, and affords a new cause of action. In the latter part of that judgment it is said, "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration, to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?" Thus a positive refusal to pay will prevent such implication, and the like where the promise is not absolute, but qualified in terms, *e. g.* to pay when able. Again, *Fearn v. Lewis* (a), *Scales v. Jacob* (b), and *Ayton v. Bolt* (c) show, that a mere acknowledgment of the existence of a debt is not necessarily of itself evidence of a new promise to pay it, and if it is not, it will not take the case out of the statute of limitations. In this case there is a letter from the defendant acknowledging that the plaintiff makes a demand; but not acknowledging the validity of it, and denying his liability to pay it. After that denial, I am of opinion that I cannot from the rest of the letter infer a promise to pay.

VAUGHAN B.—Cited *Frost v. Bengough* (d). The letter in this case states circumstances absolving the defendant's liability by length of time, and affords data from which either a distinct acknowledgment of a debt or a fresh promise to pay it can be implied.

BOLLAND and GURNEY Bs. concurred.

Rule refused.

(a) 6 Bing. 349.

(b) 3 Bing. 638.

(c) 4 id. 105.

(d) 1 Bing. 266.

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LECHMERE Bart. and Others *against* FLETCHER.

In order to take a case out of the statute of limitations, it is not necessary that the acknowledgment or promise required by 9 G. 4.

c. 14. s. 1. to be in writing, signed by the party chargeable thereby, should also state the amount of the debt, and extrinsic evidence is admissible to prove such debt.

Lechmere sued *Fulljames* and *Fletcher* in a

joint action for money lent. The defendants pleaded separately; *Fulljames* the general issue only, and *Fletcher* the general issue and the statute of limitations. The plaintiff had a verdict and judgment against *Fulljames*, but not against *Fletcher* on either issue. After six years had elapsed from the original transaction, but previous to the bringing the last-mentioned action, *Fletcher* had, in a letter to the defendants, declared his readiness to pay them *his proportion* of the debt due to them from *Fulljames* and himself. Upon the new promise contained in this letter a special action of assumpsit was brought by *Lechmere* against *Fletcher* for that proportion. At the trial the judgment against *Fulljames* was proved, but it did not appear that execution had issued against him. Held, that neither that judgment against *Fulljames*, nor the former verdict for *Fletcher*, barred *Lechmere* from recovering against *Fletcher* on his subsequent separate promise to pay his proportion of the debt originally due from himself and *Fulljames*, to the extent of the whole proportion proved to be such by extrinsic evidence, and not of nominal damages only; for evidence which could not have been adduced in the former action might have been given in the latter; *e. g.* *Fulljames* might have then proved that the defendant *Fletcher* had been a joint contractor with him to *Lechmere*, whereas *Lechmere* could not have so proved a joint debt to him in his first action against them both, or could he have used *Fletcher's* written acknowledgment as to a moiety, to take the joint debt out of the statute of limitations.

Payment of money into court admits the contract as pleaded, and damages thereon to the extent of the sum paid in; but where it was made on a special count alleging a new promise to pay the defendant's proportion of a joint debt, so as to take a case out of the statute of limitations: Held, that it did not admit the amount of that proportion, it being laid under a *videlicet*.

ASSUMPSIT. The first count stated, that whereas the defendant and one *T. Fulljames* heretofore and more than six years before the commencement of this suit, to wit, on 1 Jan. 1825, were indebted to the plaintiffs in 250*l.* for work and labour, money lent, &c. and on an account stated, and that they then and there promised to pay the said monies to the said plaintiffs on request. And whereas before and at the time of the making of the promise of the defendant herein-after next mentioned, six years from the making of the said promise of the defendant and the said *T. Fulljames* to pay the said monies to the plaintiffs, and from the time the causes of action of the plaintiffs in respect of the said monies accrued, had elapsed, and the right of action of the plaintiffs against the said defendant and *T. Fulljames* for the recovery of the said monies had by reason of such lapse of time, but

not otherwise, become barred by virtue of the statute in such case made and provided, and at the time of the making of the defendant's promise next mentioned, the said several monies had not, nor had either of them, or any part thereof, been in any manner paid or satisfied to the plaintiffs, or either of them, and they were justly entitled to receive the same monies, to wit, in &c. and thereupon, after the said lapse of six years, and within six years next before the commencement of this suit, to wit, on the 18th *April* 1831, in &c. the said defendant, in consideration of the premises, by a certain memorandum in writing, then and there signed by him, promised the said plaintiffs to pay them at any time his, the said defendant's, proportion of the said monies, in case the plaintiffs would apply, and on their applying to him for the same. And the plaintiffs aver, that the defendant's proportions of the said monies so unpaid amounted to a certain sum, to wit, a moiety of the said monies, and that plaintiffs afterwards, on &c. in &c. applied to the defendant for, and required him to pay to them such his, the defendant's, proportion of the said monies.

The second count stated that defendant and *T. Fulljames*, more than six years next before the commencement of this suit, to wit, on &c. were indebted to the plaintiffs in a large sum, to wit, 250*l.* (as in the first count; omitting the promise to pay the whole amount by defendant and *Fulljames*, and also the averments that at the time of the promise six years had elapsed, that the right of action had become barred, but that the money remained unpaid to the plaintiffs, who were justly entitled to receive the same.) It then stated, that whereas the said several last-mentioned monies being unpaid and unsatisfied, the defendant afterwards, and within six years next before the commencement of this suit, to wit, on 18th *April* 1831, in considera-

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tion of the premises respectively, and that the plaintiffs would apply to him for his proportion of the last-mentioned monies, then and there promised to pay his, the defendant's proportion of the last-mentioned several monies respectively to the plaintiffs on such application being made. Averment, that the defendant's proportion of the last-mentioned several monies was and is a moiety thereof (*a*), and that they afterwards, to wit, on 1st Jan. 1833, applied to him for payment thereof, to wit, on &c. Common count, for work and labour &c. day laid, 1st Jan. 1833. Pleas, 1. Non-assumpsit to the whole declaration. 2. As to the last and common count, that the defendant did not at any time within six years next before the commencement of this suit, undertake or promise (*b*), in manner and form &c. Replications, similiter to first plea, and taking issue on the second. A sum of ten shillings was paid into court on the first two counts.

At the trial at the last *Gloucestershire* assizes before J. Parke J. the facts proved were these:—The defendant and one *Fulljames* were in 1814 commissioners for the inclosure of *Strensham* common in *Worcestershire*, and perfected it in 1818. The plaintiffs were bankers to the inclosure commissioners in order to receive and pay all monies paid in or drawn out under the inclosure act. The defendant and *Fulljames* had both drawn checks on the plaintiffs. At the close of the account on 1st Jan. 1830, a balance of 131*l.* was due to the plaintiffs, which with interest, calculated by half-yearly rests (*c*), amounted to 233*l.* 17*s.* In that year the plaintiffs claimed the balance from the de-

(*a*) See *Whitehead v. Howard*, 2 Br. & B. 372.

(*b*) *Semble*, so pleaded, because the contract in the last count being executed the statute began to run from the time of the promise; 16 East, 421; *Sound.* 33. n. 2; 283. n. 2; 2 id. 63. c. n. 6.

(*c*) See 2 Anstr. 495, *Caliot v. Walker*; and 15 Ves. 120.

fendant, who on the 18th *April* 1831 wrote to them, saying that *Fulljames* had managed the cash concerns of the inclosure, adding, "I will at any time pay my proportion of the debt due on application for the same, Yours, *J. Fletcher*."

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In *Trinity* term 1831 an action of indebitatus assumpsit was brought in K. B. by the plaintiffs against the defendant and *Fulljames* for work and labour, money lent, paid &c. and on an account stated. The defendant and *Fulljames* appeared on that occasion by different attornies, and pleaded separately, *Fulljames* pleading non-assumpsit only; the defendant non-assumpsit, and the statute of limitations. The jury found for the plaintiffs on the issue joined between them and *Fulljames*, and assessed the damages over and above the plaintiffs costs at 20*l.* and those costs at 40*s.*; while on both the issues between the plaintiffs and the present defendant, *Fletcher*, they found for the defendant, subject to a motion (*a*). Judgment was finally given against *Fulljames* for the damages assessed by the jury, and also 73*l.* 10*s.*, in all amounting to 281*l.* 10*s.*; and further as to the issues between the plaintiffs and the defendant *Fletcher*, that they should take nothing by their bill against him, but be in mercy &c.; and further, that he should recover against them 45*l.* 18*s.* 6*d.* adjudged by the court according to the form of the statute (*b*) for costs by him in his defence in this behalf sustained, and by his assent adjudged. The plaintiffs afterwards signed judgment against *Full-*

(*a*) *Curwood*, in moving for the rule in the principal case, stated that on giving judgment on this motion Lord *Tenterden* said, "I think the effect of *Fletcher's* letter was merely this, if you will consent to take my share, I will not avail myself of the statute of limitations," in which the other judges concurred, and held that the plaintiffs could not recover in that action of indebitatus assumpsit on the defendant *Fletcher's* new promise, but must declare specially on it.

(*b*) See 9*G.* 4. c. 14. s. 1. *sub. fn.* as well as 4 *Jac.* 1. c. 15.; 23 *H.* 6. c. 15.

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james, but had not issued execution against him at the time of the trial of the present action. An examined copy of the record of this judgment was produced for the defendant, and the amount of the defendant's proportion was proved for the plaintiff.

At the trial, *Curwood*, for the defendant, contended, 1st, that the plaintiffs could not take the case out of the statute of limitations as against *Fletcher*, without giving in evidence a written acknowledgment by him of the amount as well as of the existence of the debt; *Kennett v. Millbank* (a), *Dickinson v. Hatfield* (b). And 2dly, that their recovery against *Fuljames* of the whole debt claimed from him and the present defendant as co-contractors in the joint action against them, was a bar to their recovery in the present action against *Fletcher* only on his new promise.

The learned judge having intimated that the same statement which if it had been orally made before 9 G. 4. c. 14. would have taken the case out of the statute of limitations, would have the same effect since that act, if reduced into writing, and signed by the defendant or by his direction, the plaintiff had a verdict for the moiety of the sum laid in the second count, minus certain part payments. Leave was given to move to enter a verdict for the defendant.

Curwood having obtained a rule accordingly,

Ludlow Serjt. showed cause.

The payment into court of ten shillings on the special counts has the effect not only of admitting the existence of the contract to that extent, *Cox v. Brain* (c), but also of confessing the truth of every

(a) 8 Bing. 38.

(b) 2 Moody & M. 141.

(c) 3 Taunt. 95; see also *Saxton v. Benedict*, 5 Bing. 28; *Dyer v. Ashton*, 1 B. & Cr. 3; *Stoveld v. Brewin*, 2 Bar. & Ald. 116; *Mellish v. Althoust*, 2 M. & S. 106; *Muller v. Hartshorne*, 3 Bos. & Pul. 536; *Yate v. Willan*,

allegation in them which is well pleaded. It in this case admits the truth of the special matter set out as the foundation of the cause of action, as well as the amount of the moiety averred in the second count to be due, or which may, by extrinsic evidence, be shown to be the sum contracted for.

[*Bayley B.* Payment of money into court admits the contract and the breach of it as stated in pleading, but asserts that nothing more is due by way of damages than what is so paid in. How does the second count state that 250*l.* was the sum actually due? For the averment that the defendant was indebted to the plaintiff in a sum of 250*l.* the sum being laid under a *videlicet* would be satisfied by proof that any less sum was due; *Stoveld v. Brewin* (a). *Vaughan B.* Suppose the debt sued for to have consisted of various items, what effect would payment of money into court have (b)? Payment into court in an action on a valued policy alleging a total loss does not prevent the underwriter from showing that he is not liable for a total loss to a larger amount than that paid in; *Rusher v. Palsgrave* (c), *Mellish v. Allnutt* (d), *Cox v. Parry* (e).]

The question at the trial was the defendant's liability upon his new promise to pay to the plaintiffs the moiety of the debt due to them from himself and *Fulljames*. It was said that that moiety could not be recovered against him, because by having appeared and pleaded separately to an action brought by the plaintiffs against him and *Fulljames* jointly, and having obtained judgment so as by some means to become discharged from the consequences of that action, he had

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2 East, 128; *Cox v. Parry*, 1 T. R. 464; *Watkins v. Tomers*, 2 id. 275; *Gutteridge v. Smith*, 2 H. Bl. 374.

(a) 2 B. & Ald. 116.

(b) See ante, p. 448.

(c) 1 Taunt. 419; S. C. 1 Campb. 537.

(d) 2 M. & S. 106.

(e) 1 T. R. 464.

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thereby separated himself from his originally joint liability. But that judgment was no bar; for the cause of action in the former suit being joint for the whole debt, was quite distinct from the present claim on this defendant to pay only his proportion of that debt according to his new promise. [*Bayley B.* The judgment recovered in the former action for the same cause might be given in evidence on the general issue in the present action of assumpsit, and was proved accordingly.] The moral obligation on one of two partners to pay the equal proportion of the joint debt due from him, and from which he would be discharged by the statute of limitations, except he made a new promise to pay it, is a good consideration for the new and express contract of the defendant here relied on. [*Bayley B.* The whole debt may have been paid by *Fulljames*.] Only the judgment against him was proved, and it did not appear that execution had issued; but if it had, the defendant is not liable to him for contribution of his, the defendant's, share, after having obtained judgment in the joint action against them. Then is the plaintiffs' recovery of a judgment against *Fulljames* a satisfaction of the debt originally owing to them from the defendant as well as *Fulljames*? The payment of the money into court admits that that judgment would not be such a satisfaction. Suppose judgment to have been suffered by default in this action, is there any reason why the defendant's proportion of the sum due to the plaintiffs should not be assessed as damages against him?

Curwood in support of the rule. The payment of money into court on the special counts was made as an admission by the defendant, that on a new promise in writing to pay a sum not ascertained by that writing, nominal damages might be recovered; *Dickinson v.*

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Hatfield (a). But as that payment did not admit more damages to be due, the plaintiff was bound to prove, by some written instrument, the defendant's acknowledgment not only of liability to pay something, but of the amount due, so that both together might operate as evidence of a new or continuing contract to pay the debt. Then if the written instrument only acknowledged defendant's liability to pay something, the amount could not be proved by oral testimony; *Kennett v. Milbank* (b). Since 9 Geo. 4. c. 14. all that amounted to an acknowledgment or promise, and which before that act might have been oral only, must now be in writing; whereas here, the defendant's letter, which was produced to take out of the operation of the statute a debt previously barred by it, did not state any amount due. In *Kennett v. Milbank* the plaintiff produced a composition deed, by which the defendant engaged to pay his creditors, therein named, of whom the plaintiff was one, the amount of the debts written opposite to each of their names. But the plaintiff had not executed the deed, nor was the amount of his debt ascertained by it; and the court of Common Pleas was of opinion, that that deed did not take the case out of the statute (c). [Bayley B. In *Dickinson v. Hatfield* the statute of limitations was pleaded: but there is no such plea in this case.] The declaration here supplies that requisite, by averring in the first count, that the debt was barred by the statute of limitations. [Bayley B. The second count is silent as to any such bar; but as the action is founded on a special contract to pay a debt barred by the statute, it *may* be open to the plaintiffs to show by the declaration, that the original

(a) 2 Moody & M. 143.

(b) 8 Bing. 38.

(c) See as to the date of the acknowledgment being after the six years, 8 Bing. 41, and 2 Burr. 1099.

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debt was or might have been so barred. You contend that 9 *Geo. 4. c. 14.* applies to the evidence on counts to which the statute of limitations is not pleaded by the defendant.] The special counts, by showing that a new contract is relied on to take the case out of the statute of limitations, raise the question, whether the written contract given in evidence must not mention the amount of the debt, as well as if it was raised by a plea of the statute in an ordinary case. And if the form of the record in any stage of the pleadings renders it necessary to prove a new promise, the whole of it must be so established by matter in writing. If it should be held that that which is left in dubio by the written instrument, can be made certain by oral testimony, all the inconveniences incident to it which the statute intended to prevent, will again be let in.

2dly. The judgment obtained against *Fulljames*, is a recovery against the defendant's joint contractor, and therefore a bar to the action against this defendant alone. The new promise relied on was anterior in time to that judgment, so that the point of moral obligation to pay a prior existing debt does not arise. Had it been pleaded by way of estoppel, it would have been conclusive; and without such plea it is powerful evidence for a jury; *Vooght v. Winch (a)*, *Stafford v. Clark (b)*. [*Bayley B.* Estoppels must be mutual; then how could the judgment already obtained be pleaded in bar as such? The plaintiffs have not recovered satisfaction against *Fulljames*, though they have got judgment against him.] No part of the original debt due can be recovered against the defendant, for the former contract was put an end to by the judgment in his favour, and against *Fulljames*.

(a) 2 B. & Ald. 662. See 9 B. & C. 763, 787, and note to last edition of Coke's Reports, vol. 4. 53 b.

(b) 2 Bing. 377, collecting the cases, p. 379.

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The judgment against the latter not being reversed amounted to a 'recovery' so as to bar the present action, though without satisfaction by payment; *Higgins's case* (a), *Brown v. Wootton* (b), *Com. Dig. tit. Action*, (K. 4.) and *Ferrer's case* (c), for by that judgment a matter before uncertain was reduced to a certainty. This is not a new contract, but only a promise to pay what he was liable for under the old one. [Bayley B. The plaintiffs have no security at all against this defendant for the original cause of action, by judgment or otherwise, though they have recovered against *Fulljames*. Can they not recover on a new contract differing from the original one by which the defendant bound himself individually to pay to the plaintiffs a moiety of a sum which at the time of his new promise he was not liable to pay to them? The former action was against both on a joint contract. This new contract varied the nature and amount of his liability, for it was to pay part only.] Judgment was given against *Fulljames* on the general issue, and for this defendant on his plea of the statute of limitations, as well as (by an anomaly) on his plea of the general issue also. [Bayley B. The plaintiffs had judgment against *Fulljames* only; but judgment against the drawer upon a joint and several bill is no satisfaction, even as to a subsequent party to it; *Claxton v. Swift* (d). The same is the case on a joint and several bond.] Those are excepted cases, for that bill was several as well as joint, and a joint and several bond after judgment against one, still remains the bond of the other obligor (e).

(a) 6 Coke, 45. (b) Cro. J. 73; Yelv. 67, 68, S. C. (c) 6 Coke, 7 a.

(d) Lutw. 882; 2 Show. 441, 494. Actual payment is the only satisfaction, and taking defendant in execution is not, *M'Donald v. Borington*, 4 T. R. 825, *Hayling v. Mulhall*, Bla. R. 1235.

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The new promise in writing was given before the action brought against this defendant and *Fulljames* jointly. So that by suing both they elected to abide by the rights they originally had, but which the judgment for this defendant on his second plea showed to have been taken from them by the statute of limitations. *Fulljames* had judgment against him alone, though a co-contractor with the other defendant for a joint and not a several debt.

[*Bayley B.* The defendant enters into a new contract for payment, not of the whole sum for which he might be liable, but for a proportion only. Suppose a debt to be due to *A.* from *B.* and *C.* jointly, and each of them to agree with *A.*, that in consideration that he would levy on each for only one moiety of the joint debt, each of them would pay him that moiety; would not that be a separate contract upon which each would be liable? and if so in the case of both, why should not an agreement to be made by one only, to be a separate debtor for his moiety, bind that one? (a) In order to hold *Fulljames* liable for his share, it was necessary to sue him and the present defendant jointly, or *Fulljames* would have pleaded such non-joinder in abatement. The plaintiffs go on against both, and get judgment against *Fulljames*, but not against this defendant. If they had levied the whole on *Fulljames*, might he not have sued this defendant for contribution?]

Cur. adv. vult.

BAYLEY B. afterwards delivered the judgment of the court.

This was an action on a special promise by the defendant, who was joint debtor with one *Fulljames*, to pay the plaintiffs, his, the defendant's, proportion of

(a) See *Drake v. Mitchell*, 3 East, 251.

that debt, which had been contracted more than six years before the defendant's special promise was made. [The learned judge then stated the special counts.] The defendant's promise to pay his, the defendant's, proportion of the joint debt, is laid to have been made not on any consideration of forbearance, but "in consideration of the premises." It was, therefore, a new and additional, and not a substituted contract. The payment of money into court admits such a construction as the declaration states, and damages thereon to the extent of the sum paid in.

One objection taken for the defendant was founded on the statute of limitations, and was, that on the due construction of 9 G. 4. c. 14. it was essential that the written acknowledgment of liability should have also specified the amount of the debt which the defendant promised to pay; and that as no such amount was specified, the plaintiffs were entitled to nominal damages only. On that construction of the act 10s. were paid into court on the special counts, and 10s. only.

The act 9 G. 4. c. 14. does not in terms specify any thing about a necessity to mention the amount, either in the acknowledgment or in the special promise. It only provides by section 1, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of 21 Jac. 1. c. 16. or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Mr. *Curwood* relied on *Kennett v. Milbank* (a), as recognizing the position that a defendant's acknowledgment of a debt due, or fresh promise to pay, will not be

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evidence of a continuing or new contract within that act, unless it specifies the amount of such debt. But the language of the act 9 G. 4. c. 14. does not make such specification essential, and upon consideration of its object, and of the previous decisions, we do not think it necessary that the defendant's acknowledgment or new promise should state the amount due; but that a general promise to pay, if it can be made certain as to the amount by extrinsic evidence, will be sufficient to take the case out of the statute of limitations. Some expressions in *Kennett v. Milbank* seem to imply that the amount of the sum should be specified (a). But that is not the point there adjudged. That was an action on a promissory note, to which the statute of limitations was pleaded, and the plaintiff, to take the case out of the statute, put in a composition deed, reciting that the plaintiff, and certain others, were creditors of the defendant, with a proviso that if all the creditors whose debts amounted to 10*l.* did not sign by the 13th *August* then next, the deed and all the covenants should be void. It was said that the recital did not specify the amount of the plaintiff's debt; that it was not shown to apply to the debt claimed on the promissory note, and that the deed was void for want of the plaintiff's signature, as a creditor. Now the acknowledgment being only evidence of a promise, some of the judges of the Common Pleas thought that the deed was not evidence of any new promise, and did not avail to continue in force the original contract, because all the creditors did not sign, and the deed became, therefore, void. Others of the judges thought that as there was no acknowledgment of *the debt* for which the plaintiff was suing, there could be no fresh promise to pay *that debt*. It was finally decided by the whole court that the deed did

(a) And see per *Tindal C. J. Haydon v. Williams*, 7 Bing. 163.

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not amount to an acknowledgment which would continue the old promise, or raise any new one. In *Dickinson gent. one &c. v. Hatfield (a)*, the evidence adduced to take the case out of the statute of limitations was a written promise by letter from the defendant, to pay "the balance" due to the plaintiff, but not specifying any particular amount. It was therefore insisted not to be a promise within 9 G. 4. c. 14. and *Kennett v. Milbank* was cited. Lord Tenterden delivered his opinion, that on the best consideration he could give that act, the letter produced was evidence of a new or continuing contract at the time of its date, and would entitle the plaintiff to a verdict. He said, "the act does not require the amount of the debt to be specified. Before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover; a similar promise in writing will have the same effect since; but I think he can only recover nominal damages; the promise is only to pay a balance, and there is no evidence to show what the balance is." Lord Tenterden's opinion on that act is entitled to even more than the usual consideration due to it, and, instead of being in favour of this defendant, is an authority the other way; for he says, that in that case there was no evidence to show what the balance was. Suppose a debt to have been of very long standing, and that the defendant should have written to the plaintiffs to say, "we never settled the account, but I admit no part has been paid, and if you will show what the amount of the bill is, I will pay it you." Looking at the act, it appears to us to contain nothing to preclude us from admitting extrinsic evidence to prove such amount or from giving judgment for it, or to justify us in coming to the conclusion of treating this as a promise, satisfied by nominal damages and nominal damages only.

(a) 3 M. & M. 141.

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The next question is, as to the effect of a judgment recovered in a former action brought by *Lechmere* against the present defendant *Fletcher* and one *Fulljames*, after the promise here relied on was made, and charging both defendants with the debt. The defendant *Fulljames* pleaded the general issue only, while the present defendant pleaded the general issue and the statute of limitations also. The entry of the verdict was singular. The verdict and judgment were for the plaintiffs against *Fulljames* on the general issue, which established his obligation to the extent of the whole debt; whereas the defendant *Fletcher* had a verdict and judgment on the general issue, as well as on the plea of the statute of limitations. How it happened that he had judgment on the general issue, and that *Fulljames* had not, is very singular and unaccountable; but the fact is so. Now Mr. *Curwood* cited cases to show, that as by this judgment against *Fulljames* the co-contractor with this defendant, the debt had passed in rem judicatam, it had annihilated the original debt as against *Fulljames* and the present defendant (a), so that the latter could be no longer liable. He cited *Higgins's* case (b), *Brown v. Wootton* (c), and *Comyns's Digest* tit. *Action* (K). I collect from *Higgins's* case that the testator in his lifetime had sued the defendant upon the bond, and recovered judgment against him; and the question was, whether the executor had an option to disregard the judgment and bring another action on the bond. The court thought he had no such option after the debt secured by it had been changed into a judgment debt of a higher nature, the judgment standing in force. But that case takes the distinction which is also to be found in other books, that where two are bound jointly and severally, and

(a) But see per Lord *Ellenborough*, *Drake v. Mitchell*, 3 East, 258.

(b) 6 Coke, 44 b.

(c) Cro. Jac. 73. Yelv. 68, S. C.

judgment is obtained against one of them, that judgment does not waive the right to sue the other on the bond, for as against him the nature of the bond is not changed, and, notwithstanding the judgment, he may plead that it is not his deed.

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Brown v. Wootton was an action of trover, which stands on a very different footing from cases of contract. In an action of tort, all or any of the defendants may be sued. If you sue one and not all, and recover, then as the damages were in their nature uncertain, you have by the judgment reduced them to certainty; and having done so against *that one*, you are considered to have done so *as against all*, and so cannot afterwards sue any of the other parties originally liable. Had you sued all originally, you must have had the same and entire damages against them all. *Popham C. J.* expressly points out the distinction between cases where the demand is originally certain, and where it is for arbitrary damages, in these words: "If one have cause of action against two, and obtain judgment against the one, he shall not have remedy against the other; and the difference between this case and debt upon an obligation against two is this, *because there every one of them is chargeable and liable to the entire debt*, and therefore a recovery against one is no bar as to the other until satisfaction." Chief Baron *Comyns* in his *Digest*, tit. *Action* (K. 4.) principally notices those cases where the damages are uncertain, as in tort, where a recovery against one is a bar in an action against others for the same cause; but it does not follow that in case of a debt certain, the same consequences follow. If, indeed, the debt, whether by bond or simple contract, be *joint only* and not several, a judgment against one joint contractor only, (the others not being outlawed,) *may* be an invincible obstacle to suing any other of the joint contractors after-

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wards, because they might plead that they only contracted jointly with the other, who was previously sued, and therefore could not be joined (a): and upon principle, I think, this would be so, though I have found no case precisely applicable. That, if so, would only be so held on the ground of the difficulty arising from the form of action; but in this case the circumstance that there was a *several* as well as a *joint* promise, removes the technical difficulty. Here was first a joint contract only by the defendant and *Fulljames*; afterwards a separate one binding this defendant, but to a different extent than before. He was originally liable to be sued with the other joint contractor for the whole debt, and execution might have been levied on him only; but by the separate contract in question, he is only to be liable to the extent of *his proportion of that debt*.

There are many cases upon the liability of parties under joint and *several* contracts with and without specialty. *Whiteacres v. Hankinson* (b) was debt on a joint and *several* bond; plea, that *Woodcock* was bound jointly and severally with him, and that plaintiff recovered against *Woodcock*, and took him in execution, and that the sheriff suffered him to go at large. Plaintiff demurred and had judgment without argument; for execution against one, without satisfaction (*viz.* of the whole), is no bar to a suit against the other; but if he had pleaded that the sheriff suffered him to go at large by the licence or command of the plaintiff, it had been a discharge, and might have been pleaded in bar. That case with *Higgins's* case (c), *Brown v. Wootton* (d) cited by *Comyns* in his *Digest*, tit. *Action* (L. 4.) establish, that where there is a joint obligation as well

(a) *Anon. Moor*, 29, cited *Com. Dig.* tit. *Action* (K. 4.) is like in facts, but the judgment turned on another point.

(b) *Cro. Car.* 7b.

(c) 6 *Coke*, 44 b.

(d) *Cro. Jac.* 73; *Yelv.* 68, S. C.

as a separate one, one several obligor may be sued on the several part of his obligation, except another obligor against whom judgment has been obtained on the joint obligation has satisfied it. That would be an answer as against the obligee; but if any proportion of the debt secured is unpaid, he may sue any of the other obligors. Then in this case, where, besides a joint promise by two to pay all, there is a separate obligation also by one to pay his proportion, the plaintiff does not, by merely recovering against one of the joint contractors, lose the right of suing the other upon his separate contract.

It was argued, that the suing on the original *joint* contract, was a bar to the suit on the subsequent *several* contract; and had the latter been put in substitution for the former, or as an alternative only, that might have been the consequence. But on looking at the promise laid in the declaration, no part of the consideration for it appears to have been a *release* from the joint obligation of the defendant and *Fulljames*, or a forbearance to sue on that joint obligation. Nor could it be the intention of the parties. They had no desire to exonerate *Fulljames*. He was still open to be sued on the joint contract, on which he could not in strictness be sued alone. The intention was, that by way of consideration for the new promise to pay, the plaintiffs should give up their claim against this defendant *for more than his proportion*. The only operation it could have, must have been to make it unfair to sue this defendant for more than his proportion; but it did not take away the right to sue *Fulljames* with him, and it was only on the joint contract *Fulljames* could be sued; in point of law they must be sued together on the original liability, or *Fulljames* might have defeated any action in which this defendant was not joined, by pleading such nonjoinder in abate-

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ment. Then the verdict for the defendant on the general issue, in the original action against him and *Fulljames*, was not a bar to this action, because evidence was here admissible on the general issue, which could not have been adduced in the former action. There *Fulljames* could not have been called as a witness to prove the defendant to be a joint contractor with himself, so that the plaintiff might have failed to fix the defendant with joint liability in that action for want of the evidence of *Fulljames*. Whereas, in this action, he might establish under the general issue by *Fulljames's* evidence, that this defendant was a joint contractor. Wherever the same evidence will sustain both actions, a recovery in one action or judgment in one may be pleaded in bar of the other, but otherwise not; *Put and another v. Rawsterne and others* (a). But where a subsequent judgment is sustainable by evidence, which could not have been produced in the former suit, the former judgment would not be a bar.

As to the plea of the statute of limitations in the former suit, the verdict for the defendant on it did not bar the present action. A joint debt had been there barred by the statute of limitations, but a joint debt only; for the question there was, whether the joint debt of this defendant and *Fulljames* had been taken out of the operation of the statute of limitations by any thing which this defendant *Fletcher* had done. But the written promise of the defendant, relied on in this action, would not prove that it had; for the effect of it is, not to take the joint debt out of that statute, but this defendant's proportion of it, so as to make him separately liable to the extent of that proportion, and of that proportion only.

(a) Sir T. Ray. 472; see also *Hitchin v. Campbell*, 2 Bla. R. 831, relied on by Lord Eldon C. J. in *Martin v. Kennedy*, 3 Bos. & Pul. 71.

Assuming, therefore, that the statute 9 G. 4. c. 14. applies to this case, and that the point insisted on by the defendant can arise on the special counts without a plea of the statute of limitations, we are of opinion that the acknowledgment of the defendant, as proved in this case, was sufficient to take it out of that statute as far as relates to the proportion of the original debt due from him; and that neither the former recovery against *Fulljames*, nor the former verdict for this defendant, entitle him to be discharged from liability to the plaintiffs for that proportion, which they seek to recover in this action.

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Rule discharged.

HUNTLEY *against* SANDERSON and WILKINSON.

ASSUMPSIT. The declaration (filed 29 January 1833,) stated in the first count, that on the 17th June 1826, in consideration that the plaintiff, at the request of the defendants, would purchase a cargo of timber for the defendants, at a certain place beyond the seas, to wit, *Miramichi* in *New Brunswick*, and would draw a bill of exchange for the amount of such cargo upon the defendants, they the defendants under-
 The master of a ship was dispatched by the owners from *England* to *Miramichi*, with orders to buy timber and draw on them for the amount. He went there accordingly, bought timber, drew a bill there on them for the amount, in favour of the seller or his order, and delivered the cargo to the owners in *Liverpool*, before the bill which was drawn at 60 days' sight, was presented to them there for acceptance, and before 60 days from its date had elapsed. This bill, bearing several indorsements, was duly presented to the defendants for acceptance, and was protested for non-acceptance. The plaintiff was known to be at *Liverpool* for several months after the refusal to accept, before he went to *India*. On his again going to *Miramichi* he was arrested as drawer of the bill, at the suit of an indorser, and paid it in order to his liberation. He then sued the defendants in a special action of assumpsit, for not paying the bill, for not accepting it, and for not indemnifying him against all loss, &c. sustained by him from the drawing it. He did not prove at the trial that he had received any notice whatever of the dishonour. Held, that under the circumstances existing between the parties to the action, such notice was not an essential part of the plaintiff's case, and also that the law would imply a promise by the defendants to indemnify the plaintiff against the consequences of his drawing the bill: consequently, that the statute of limitations did not bar his action on that promise, though no damnification occurred till more than six years after the promise to indemnify.

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took and promised the plaintiff that they would duly pay such bill when due. That the plaintiff confiding &c., on the 14th *September* 1826, at *Miramichi* afore-said, to wit, at &c. purchased a cargo of timber for the defendants, whereof he purchased part of one *William Ledden* for 154*l.* 11*s.* 11*d.* and then and there drew a certain bill of exchange upon the defendants for the amount of the purchase money of the said part of the cargo; by which bill the plaintiff then and there requested the defendants, sixty days after sight of that his second bill of exchange, (first and third of the same tenor and date not paid,) to pay to the order of the said *William Ledden* the sum of 154*l.* 11*s.* 11*d.* in *London* for value received, and then and there delivered the same to the said *W. Ledden*. That on the 21st *November* 1826, at &c. the defendants had sight of the said bill, and were then and there requested to accept the same; and that afterwards, on the 23d of *January* 1827, at &c. when the said bill became due and payable, according to the tenor and effect thereof, the same was duly presented to the defendants, and the defendants were then and there requested to pay the same. That the defendants not regarding &c. did not nor would, when the said bill was so presented for payment, or at any other time, pay the same; but then and there wholly refused, and have hitherto wholly refused so to do, to wit, at &c. although the said first and third of exchange have not nor have either of them been paid or presented for payment, by means and in consequence whereof the plaintiff as such drawer of the said bill, afterwards on the 23d of *October* 1832, at &c. was called upon and forced and obliged to pay, and did then and there pay to one *Jared Betts*, the holder of the said bill, the said sum of money in the said bill specified, together with certain interest thereon, and the costs of a certain action

before then brought, to wit, at &c. by the said *J. B.* against the said plaintiff as drawer of the said bill, and certain other expenses for exchange, re-exchange and postage, in the whole amounting to a large sum, to wit, *264l. 7s. 10d.*; by means of the said several premises, the plaintiff hath been and is damnified to the amount thereof, to wit, at &c.

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Second count. The same consideration as in the first count, and a promise by the defendants that they would duly accept such bill when presented to them for that purpose; that the plaintiff confiding &c. bought the timber and drew the bill, (as in the first count) and then averred, that afterwards, on *21st of November 1826*, at &c. the defendants had sight of the said bill, and were then and there requested to accept the same. That the defendants not regarding &c., did not nor would, when the said bill was so presented to them for acceptance, or at any other time, accept the same, but then and there wholly refused so to do or to pay the same, to wit, at &c. although the said first and third of exchange have not nor have either of them been accepted, or been presented for acceptance or paid. (Special damage, same as in the first count.)

Third count. Same consideration as in the first count, and a promise by the defendants that they would indemnify and save harmless the plaintiff from all loss, damage, costs, charges, and expenses which should or might be made or brought, arise or happen for or by reason of the plaintiff so drawing the last-mentioned bill of exchange. Averment, that the plaintiff bought the timber and drew the bill, (as in the first count). Averment, that afterwards on the *21st November 1826*, at &c. the defendants had sight of the said bill, and were then and there requested to accept the same; and that afterwards on the *23d January 1827*;

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at &c. when the said bill became due and payable according to the tenor and effect thereof, the same was duly presented to the defendants, to wit, at &c. and the defendants were then and there requested to pay the same; but that the defendants did not nor would, when the said bill was so presented to them for payment, or at any other time, pay the same, but then and there wholly refused, and have hitherto wholly refused so to do, to wit, at &c. although the said first and third of exchange have not nor have either of them been paid or presented for payment. That the defendants, not regarding &c. did not nor would indemnify or save harmless the plaintiff from the loss, damage, costs, charges, or expenses arising and happening to him the plaintiff by reason of his, the plaintiff's, having so drawn the said bills, but have hitherto wholly neglected and refused, and still wholly neglect and refuse so to do, to wit, at &c. by means and in consequence whereof the plaintiff as such drawer of the said bill, afterwards &c. (special damage as in the first count). There were three other counts or promises to indemnify, with the money counts and account stated.

Pleas, by each defendant separately: 1. non-assumpsit, 2. statute of limitations. The declaration was filed 29 January 1833. The principal facts proved at the trial at the last assizes for *Lancashire*, were as follows. In 1826 the defendants were joint owners of the ship *Prince Regent* of *Liverpool*, and the plaintiff was about to navigate her as their master on a voyage to *Miramichi* in *New Brunswick*. Previous to the plaintiff's sailing from *London*, the defendants sent him, with the ship's papers, a letter of instructions to buy timber on his arrival at *Miramichi*, giving Mr. *W. Ledden* the preference if his terms were as eligible as those of others. It ended thus: "you must keep the

ship's disbursements as low as possible, and put the largest possible cargo on board of her. You will draw upon us for the amount of cargo and disbursements in separate bills, and fill up the bills of lading with our address." Signed *H. J. Sanderson, & Co.*

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The defendants never were general partners in trade, but occasionally made joint purchases in which they used the above firm. The plaintiff sailed in the *June* of that year, bought timber at *Miramichi* in *August* of *W. Ledden* to the invoiced amount of 154*l.* 11*s.* 11*d.*, and thereupon drew the following bill on the defendants.

"*Miramichi*, 4th September 1826.

£154. 11*s.* 11*d.* sterling.

Sixty days after sight of this second of exchange, (first and third of same tenor and date not paid) pay to the order of Mr. *W. Ledden* the sum of 154*l.* 11*s.* 11*d.* in *London*, value received, which place to account of cargo per *Prince Regent*.

George Huntley.

To Messrs. *H. J. Sanderson & Co.*
 merchants, *Liverpool*."

The plaintiff arrived in *Liverpool* on board the *Prince Regent* in *October* 1826, and having delivered the timber to the defendants, was well known to have remained there till the middle of the following *April*. The ship's arrival in *Liverpool*, with the plaintiff as her commander, must have been well known in all mercantile circles there, being advertised in all the newspapers. On 21st *November* 1826 the bill was duly presented to the defendants at *Liverpool* for acceptance, which they refused, and a notary drew up a protest, by which it appeared that at the time of such presentment it was thus indorsed: "*W. Ledden, Jared Betts, F. Patteson, R. Ligerswood.* Pay to

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the order of Messrs. *James Hunter & Co. Rogerson, Hunter & Co.*" On 23d January 1827, the bill was presented for payment to *Barclay, Tritton & Co.* bankers in *London*, but it was not shown that they were the *London* agents of either defendant (as recited in the following protest). The answer being "no advice," the following protest was issued: "On this day, the 23d of January 1827, at the request of Mr. *James Rogerson* of *London*, merchant, bearer of the original bill of exchange, whereof a true copy is on the other side written: *J. W. Duff*, of *London*, notary public, &c. exhibited the said bill to a clerk in the banking-house of Messrs. *Barclay, Tritton, Bevan & Co.* the bankers in this city of Messrs. *H. J. Sanderson & Co.*, upon whom the same is drawn, and demanded payment of its contents (the time limited in the said bill for payment thereof being elapsed since the same was protested for non-acceptance, and the said bill being payable in *London*, but no particular domicile being fixed or appointed therein or thereby for payment thereof in this city,) which demand was not complied with, but the said clerk thereunto answered 'no advice,' nor could I the said notary obtain payment of the said bill on the Royal Exchange of or elsewhere in this city, whereupon &c."

No notice of the non-acceptance or dishonour was given to the plaintiff. In April 1830 the defendant *Wilkinson* became a lunatic, and continued so at the trial, the defendant *Sanderson* being his committee.

On 23d October 1832, the plaintiff having again gone to *Miramichi*, was arrested for the amount of the bill by *Betts*, and paid the debt with re-exchange, interest and costs. The plaintiff had a verdict for 20*l.* *Gurney B.* giving leave to the defendants to move to enter a nonsuit on two grounds: 1st, That the plain-

tiff had given no proof of having had due notice of the dishonour, though he was at *Liverpool* at that time, *Turner v. Leech* (a). 2d, That the statute of limitations was a bar to the action (b).

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Cresswell moved for a rule accordingly. *Bayley B.* asked, whether a cause of action could be said to accrue by breach of the contract to accept, before the period of time when the party entitled to a remedy for such breach knew of it? It was answered, that in the cases of loss to parties by the negligence of their attorneys, the clients are equally ignorant of that negligence, and yet the statute has been held a bar to actions for it. A rule to enter a nonsuit having been granted on both grounds,

Wightman showed cause. First, the circumstance that the plaintiff, the drawer, was at *Liverpool* at the time of the dishonour of the bill in *London*, is not sufficient of itself to raise the first point. For there is no evidence that he was discharged by laches of prior parties, and these defendants being strangers to the bill, proof of due notice to the plaintiff was not necessary. He might not be known to be in *Liverpool*, and the course would then be to send back this foreign bill to those who sent it from *Miramichi*. This is an action against drawees by an agent authorized to draw on them at their own request, without his having any interest in the timber, for the price of which the bill was drawn. Then he had a right to expect that it would be accepted and paid by the defendants; and was not called on to know or discover who was

(a) 4 Barn. & Ald. 451.

(b) *Battley v. Faulkner*, 3 Barn. & Ald. 288.

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then the holder, nor need the holder have known or looked to the plaintiff for the amount.

But the second and main point is, whether the statute of limitations bars the action. The plaintiff here complains of the breach of that implied contract of indemnity, which the law raises in favour of a party who draws a bill at the request or by the authority of another. The plaintiff had no cause of action against the defendants before he sustained damage in consequence of their breach of that contract. He was not injured by the drawing, non-acceptance, or dishonour of the bill, nor did he sustain damage thereby till his arrest at *Miramichi* in 1832. Then as no breach of the contract of indemnity had previously taken place, the statute did not begin to run till that arrest. This circumstance distinguishes this case from those which have arisen on implied undertakings of attornies and brokers, to do an act at a particular time. In those cases the cause of action arose at the period at which the defendant neglected to do the particular act he had undertaken to do, and the statute therefore began to run from that time^(a). But in this case had the plaintiff known that the bill was refused payment, he had no cause of action till personally damaged by the defendants' neglect to indemnify him. He was not bound to see whether the bill was accepted and paid, for he might presume that the defendants had done so. He could not have sued them on the bill, but as accommodation drawer might sue them for a breach of their implied contract to indemnify him for so drawing. Then the statute of limitations only began to run when the damage accrued by the breach of the contract of indemnity.

(a) See *Howell v. Young*, 5 B. & Cr. 259; *Brown v. Howard*, 2 Br. & B. 73; *Short v. Macarthy*, 3 B. & Ald. 626.

Cresswell for the defendant *Sanderson*, supported the rule. The holder was bound to give notice of the dishonour of the bill to the person from whom he took it; and that rule applies though the action is not on the bill, for it arises out of it. Here no attempt appears to give notice of dishonour, or to search after the persons to whom it should have been given. The right course would have been to have returned the dishonoured bill to *Miramichi* by the first regular ship, *Muilman v. D'Eguino* (a). Had that been done, notice of dishonour might have been sent back to the plaintiff at *Liverpool* before he quitted it. No such notice was proved to have been given, and he was therefore discharged from liability on the bill. Then if, having a legal defence to the proceeding at *Miramichi* on that ground (b), he did not avail himself of it, he cannot put the defendants in a worse situation by volunteering a payment there, which he need not have made. *Turner v. Leech* (c) shows that the laches of any one indorsee of a bill to give notice in due time to the prior indorser, discharges every other party against whom the latter would otherwise have had a remedy, had he paid the bill on timely notice. And it was held in that case, that a payment of the bill by the prior indorser, when applied to out of time, was made in his own wrong; and that he, having been discharged by the laches of the subsequent indorsee, could not recover against a prior indorser to whom he had given due notice of dishonour; though in point of fact, from the number of names on the bill, the notice was received by the prior

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(a) 2 H. Bla. 565.

(b) The sight of the bill not having appeared in a legal way till the protest for non-acceptance on 21st November 1826, (see *Campbell v. French*, 6 T. R. 212,) *semble*, that the statute of limitations had not operated on the bill at the time of the plaintiff's arrest at *Miramichi* on 23d October 1832, so as to afford him a defence to that action under *Stafford v. Forcer*, 10 Mod. 312.

(c) 4 Bar. & Ald. 451.

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indorser, whose name was eighth on the bill, sooner than if the bill had passed regularly through the hands of the ninth and tenth indorsers, the plaintiff being eleventh. [*Bayley B. Leech* was not liable unless he had received due notice.] Here the plaintiff, to support his claim of indemnity, must prove that he was compellable by law to pay the bill. [*Bayley B.* How can we know that he had a legal defence? How, where and when was the plaintiff to receive notice of the dishonour? He does not sue on the bill, and the mere circumstance of his arrest gave him a right to sue for damages arising thereby. What remedy over would the defendants have had, had they accepted and been compelled to pay? They refused to become parties to the bill; why then are they to be discharged because the plaintiff had no notice of its dishonour?] 2dly. The plaintiff's cause of action was complete when the defendants refused to accept the bill. That was his ground of complaint, though in order to avoid the effect of the statute of limitations it is now said that the action did not accrue till he was damnified, more than six years afterwards. These defendants had impliedly contracted to accept the bill drawn by the plaintiff; their refusal to do so was a distinct breach of promise enabling him to sue immediately, though he had not at that time sustained actual damage; *Marsetti v. Williams* (a). It is said that the defendants' contract was to indemnify; if so, it was to indemnify by accepting and paying the bill, and the breach of that contract was the gist of the plaintiff's action, so that the statute began to run from *November 1826*. *Battley v. Faulkner* (b) is in point. There the defendants had sold winter wheat as spring wheat to the plaintiffs, who, having sold it again as such, were sued for the damages arising from the difference of quality,

(a) 1 B. & Adol. 415.

(b) 3 B. & Ald. 288.

and after eight years litigation compelled to pay them. They having sued the original vendors, it was held, that though no actual breach of the contract of warranty, that breach, and not the plaintiff's subsequent damage thereby, was the cause of action from which the statute began to run; and the defendants had judgment, *Short v. Macarthy* (a). Again, *Brown v. Howard* (b), *Whitehead v. Howard* (c), *Granger v. George* (d), *Howell v. Young* (e), elucidate the same point, as do the older cases. *The Sheriffs of Norwich v. Bradshaw* (f), and *Barkly and Gibbs, Bailiffs of Worcester v. Kempstow* (g), are in point. The latter was an action of assumpsit on a contract to keep harmless and indemnify the plaintiffs against escape; and it was held to be no defence that they had not been sued for an escape which had happened, for immediately thereupon they were damnified, and in danger to be sued, and might sue the defendant presently, and not tarry till they were sued.

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Cowling for the other defendant. *Sheppard's Touchstone* 391. shows distinctly that it lay on the plaintiff to prove that he was actually damnified by being legally bound to pay the money. Now this averment that he was compelled to pay is not supported without evidence that notice of dishonour was sent by the holder to the prior indorser at *Miramichi* by the first regular ship. It must be taken that he, as a prior party on the bill, was discharged by that neglect, so that his payment of the bill afterwards was in his own wrong, and no breach of the defendants' contract to accept or to indemnify by accepting; *Roscow v. Hardy* (h), *Marsh v.*

(a) 3 B. & A. 626. (b) 2 Brod. & B. 73. (c) 2 Brod. & B. 372.

(d) 5 B. & Cr. 149. (e) Id. 259. (f) Cro. Eliz. 53.

(g) Cro. Eliz. 123, cited in *Goddard v. Vanderheyden*, 3 Wils. 268.

(h) 12 East, 434; 2 Campb. 458. S. C.

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Maxwell (a), *Turner v. Leech* (b). [*Bayley* B. In those cases it was endeavoured to recover against prior parties to the bill; here the plaintiff sues for compensation for an injury sustained in consequence of acting as the defendants' agent at their request.] Had a judgment been obtained against the plaintiff at *Miramichi* it must have been founded on legal proof of notice, and if produced at this trial might have superseded the necessity for such proof.

Secondly. The defendants' contract was in substance to provide funds so as to guard the plaintiff from being damnified. But even supposing the implied promise to have been to indemnify generally, and not merely to accept, and by so doing to indemnify, the defendants' refusal to accept was a breach of that contract; the plaintiff being then liable to be sued was then damnified, and the statute of limitations is consequently a bar to this action. It would be inconvenient to hold that a party indemnified has no cause of action till he incurs an actual loss, for in some cases a long time might elapse from the breach of promise in which the injury originated, before such proof could be given, during which period the redress which might have been before had against the party indemnifying, might become unattainable from his death or insolvency. A contract to indemnify is not passive or negative, but imposes active duties, and a party so contracting is bound to take steps for the security of the party to be saved harmless (c). Here, non-acceptance was a failure by the defendants to take the first step for that object. *Comyn's Digest*, tit. *Condition* (I.), shows that a condition to save *A.* harmless from a bond in which he is bound to *B.*, or from suits and demands concerning it, obliges the party indemnifying to discharge it by

(a) 2 Campb. 210 n.

(b) 4 B. & Ald. 251.

(c) See *Broughton's case*, 5 Co. 24 a.

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release or otherwise, and that the condition is broken if *A.* pay *B.* the money at the day, though not sued or arrested for it. So if the obligation be forfeited whereby he is liable to be sued, a cause of action then accrues on a contract of indemnity in respect of any liability to suit incurred by the party guaranteed; *Abbott v. Johnson* (a), *Barkly v. Kempstow* (b), *Goddard v. Vanderheyden* (c). What is said by the court in the latter case (pp. 269, 270) supports this position. They distinguished between a claim for unliquidated damages and actual damnification by payment of a certain sum of money, as two different consequences of the same breach of a condition of a bond to indemnify; though they held (pp. 271, 272) that in that case the cause of action of a bail against the defendant, for not appearing at the return of the writ, whereby judgment was obtained on the bail bond against the bail, was not a debt for the purposes of proof under a commission of bankruptcy against the defendant or for arresting him. [Vaughan B. Would payment of this bill by the defendants after their refusal to accept it, but before any action brought for such non-acceptance, have been any defence to that action if subsequently brought?] It could not have been pleaded in bar to it. *Bullock v. Lloyd* (d) is an authority to show that the whole sum due on the bill might then have been recovered by the plaintiff. [Bayley B. Could the plaintiff maintain an action till he had suffered some actual damage?] *Mazzetti v. Williams* (e), and *Van Wart v. Woolley and Others* (f), are authorities that at least nominal damages were recoverable. Indeed from the latter case it may be contended that the plaintiff might have then sued

(a) 3 Bulstrode, 233.

(b) Cro. Eliz. 123.

(c) 3 Wills. 262.

(d) 2 C. & P. 119.

(e) 1 B. & Adol. 415.

(f) 3 B. & Cr. 439. See also the new trial, 1 Mood. & M. 420.

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the defendants for timber sold and delivered, it having been bought at *Miramichi* on his credit. But if only nominal damages could have been recovered at the time of the dishonour, *Howell v. Young* (a) shows that the statute began to run from the time when the cause of action was completed by the defendants breach of their contract to accept the plaintiff's bill; it is therefore a bar to a subsequent suit or action resting on the same breach. The judgment of *Bayley J.* shows that the misconduct of the defendant was the cause of action in that case, and that the special damage, though resulting from it, constituted only part of the injury sustained by the plaintiff, and was not of itself a cause of action. Now every count, particularly the third, states the payment by the plaintiff as the consequence of that dishonour by the defendants, which afforded a prior cause of action, and not as a substantive cause of action itself.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

BAYLEY B.—This was a special action of assumpsit upon a promise to pay a bill of exchange drawn by the plaintiff upon the defendants, upon another promise to accept it, and upon a third promise to indemnify the plaintiff from all loss, damages, costs, charges, and expenses which might happen to him from his having drawn the bill. The facts of the case were shortly these:—The defendants were in 1826 owners of the ship *Prince Regent*, of which the plaintiff was the captain. In the *June* of that year they dispatched him to *Miramichi* with instructions to purchase a cargo of timber, and draw upon them for the amount at sixty days' sight, in favour of the seller, *W. Ledden*, or his

(a) 5 B. & Cr. 259.

order. The bill was dated 4th *Sept.* 1826, and on the 21st *Nov.* it was duly presented for acceptance, and protested for non-acceptance. It was again presented for payment at the time when, if it had been accepted, it would have become due; but a doubt having been raised whether that presentment was at a proper place, and it being immaterial whether a due presentment was made or not, that presentment may be laid out of the case. The plaintiff brought the timber to *Liverpool* in the *Prince Regent*, and was there with that vessel under his command from *Oct.* 1826 until the middle of *April* 1827, and it did not appear upon the trial of this cause that he received any notice of the dishonour of the bill either from the then holder or from the defendants, who having got the timber, which was the consideration for it, had dishonoured the bill by which payment for that timber was to have been made^(a).

In 1832 the plaintiff being at *Miramichi*, was arrested there upon the bill; he paid it to release himself from the arrest, and whether he was entitled to be reimbursed by the defendants is the question in this cause.

Two objections are relied upon by the defendants; one, that as the plaintiff did not appear to have had notice of the bill's dishonour, he was under no legal obligation to pay it, and paid it of his wrong; the other, that his right of action accrued upon the dishonour of the bill by the refusal to accept; and that the subsequent damnification by his being forced to pay, gave no new right of action, though it might influence the damages; and consequently that the statute of limitations was a bar.

As to the former, this is not the case of an ordinary drawer of a bill of exchange, but that of a drawer

(a) N. B.—The timber was thus procured in order to balance an outstanding debt from *Ledden* to *Wilkinson*.

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identified in a great degree with the defendants, his drawees, and left unwarrantably in ignorance by them when they ought to have apprized him of their refusal to accept, and deserted by them when they ought to have given him protection. The bill was drawn for goods bought by the plaintiff; he was agent in that purchase for the defendants; they are his principals; he draws upon them for payment, they dishonour his draft; they do not appear to have given any reason for that step; was not this then in substance a disavowal of his agency and right to draw, and might it not reasonably be expected that the tribunals at *Miramichi* might have held this a case in which the plaintiff would have been liable upon the bill, even without notice of the refusal to accept? He either had authority from the defendants to draw, and was really their agent, or he was not. If he were, he would have his remedy over against them, and so would be indemnified; if he was not, he was to be considered as principal; and in the former case he might have been considered by the courts at *Miramichi* as standing upon the same ground with the defendants, and equally liable with them. Suppose, however, that the plaintiff had a fair chance of resisting the claim upon him at *Miramichi*, have the defendants so conducted themselves towards him as to justify them in making the objection that he did not? They ought to have apprized him of their refusal to accept, and of the motives on which that refusal was grounded; but they did not. They ought to have given him instructions what course to pursue if he were called upon for payment, and should have given him authority and directions upon whom to call in case of need, but they do neither. The plaintiff was arrested in a foreign country, as far as we can judge, unexpectedly, for a debt which was not his own, but for which the defendants, his employers, had had value; he is

without any instructions how to act; it does not appear from whom he got assistance; and under these circumstances we are opinion that the defendants cannot say he did wrong in paying the money. Upon the special grounds, therefore, that the plaintiff drew the bill because he was agent to the defendants; that it was drawn not for his purposes, but to pay for goods he had bought for them; that it does not appear that they even apprised him they had dishonoured the bill, or gave him any instructions how to act if called upon for payment; we are of opinion that the want of notice to the plaintiff of the dishonour of the bill, from the then holder of the bill, furnishes no ground of defence in this action.

The second ground of defence is upon the statute of limitations, and is founded upon the ground that the promise to accept, or to pay, is the promise the law would imply in this case, and that the promise to indemnify is not. But, upon consideration, we are of opinion that the promise to indemnify is the promise the law would imply. There might be justifiable grounds for a refusal to accept or pay, for instance, fraud or want of title in the seller; so that it would be against reason to imply that the defendants should forego their right to insist upon any such ground, and it would be utterly immaterial to the plaintiff whether they accepted or paid, so long as the neglect to accept or pay did not damnify him. Besides, upon a promise to accept or pay there could be no proper rule for estimating the damages till damnification accrued. We are therefore of opinion that the promise to indemnify is the promise the law would in this case imply, and that as there was no damnification till 1832, the statute of limitations does not apply.

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Rule discharged.

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ROPER *against* SHEASBY and Another.

Goods were sent by the plaintiff to the defendants, on sale or return. The defendants returned part to the plaintiff's shopman. The plaintiff demanded payment for the whole, and was not informed by the defendants that part had been returned. He afterwards arrested them for the higher sum, but failed to recover the item charged for the article returned. Held, that there was reasonable and probable cause for the arrest; and the court refused to grant the defendant his costs under 43 G. 3. c. 46. s. 3.

MANNING moved for a rule to show cause why the defendants' costs should not be taxed and paid by the plaintiff to the defendants, pursuant to 43 Geo. 3. c. 46. s. 3; the defendants having been arrested by the plaintiff for 48*l.* 12*s.* 3*d.*, and having recovered at the trial only 44*l.* 8*s.* 3*d.* The debt was for goods sent by the plaintiff, a manufacturer, to the defendants, who were ironmongers, on sale or return; among them was a tea-urn, charged at 4 guineas, which was returned by the defendants to the plaintiff's shopman in *Sept.* 1832, but it was not sworn that the plaintiff knew it to have been so returned when the defendants were arrested in *March* 1832. The previous application for payment was for the full sum, and the defendants promised to look at the bills and pay them if correct. *Manning* urged that stat. 43 Geo. 3. c. 46. s. 3. (a) is imperative that no man shall be arrested for more than is really due.

Day v. Picton (b) is a strong case in favour of the defendants; for as it there appeared that the goods obtained from the plaintiff by the defendant had been immediately sold by him at an under price, clear proof appeared of his intent to defraud the plaintiff, who

(a) 43 Geo. 3. c. 46. s. 3. enacts, that in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit, *provided* it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any *reasonable or probable cause* for causing the defendant to be arrested and held to special bail in such amount as aforesaid; and *provided* such court shall thereupon by a rule or order of the same court direct that such costs shall be allowed to the defendant or defendants.

(b) 10 B. & Cr. 120.

would therefore have been protected by the court had the act permitted. The plaintiff had in that case sold wine to the defendant to be paid for half in ready money and half by a bill at three months; the ready money not having been paid, the plaintiff arrested him for the full price of the goods before the credit had expired, and the court held that he had no reasonable or probable cause for so doing, and awarded costs to the defendant. *Donlan v. Brett* (a) shows that in motions under this act it is sufficient to show that the plaintiff had no reasonable or probable cause for arresting the plaintiff for the sum for which he was in fact arrested, and that it is not necessary to show malice. The proviso at the end of the section vests no discretion in the court, and only points out the means by which the object of the legislature is to be effected. The legislature intended that a plaintiff should be subjected to the payment of costs if by any neglect of him or his agents the defendant is obliged to submit to imprisonment, or to find bail for more than he really owes.

BAYLEY B.—The plaintiff in this case had clearly a reasonable and probable cause for arresting the defendants for the higher sum, for it does not appear that the defendants ever apprised him of their having returned the urn, or that it had been returned by mistake; but they suffered the plaintiff to act under the impression that the higher sum was actually due for the whole of the goods delivered. Now in the cases cited there was a want of reasonable and probable cause, for it was impossible that it should exist in *Day v. Picton*, where the goods for which the arrest took place were to be paid for not with ready money but on credit at a date subsequent to the arrest; nor

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(a) 10 B. & Cr. 117.

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could it exist in *Donlan v. Brett*, where the requisites to make the sum claimed a debt were wanting. Here the plaintiff had delivered goods to the defendant to the amount of 48*l.* 12*s.* 3*d.*, and demanded that sum; no objection was then made, or was it communicated to the plaintiff that any part of them had been returned. The fact of that return might therefore have been unknown to the plaintiff.

VAUGHAN B.—I am of opinion that the terms of this enactment, when carefully weighed with the proviso annexed to them, do not compel the court to grant the defendant his costs in every case where the arrest happens to be for more than the plaintiff may at the trial be enabled to prove to be due. I think that the proviso invests the court with a discretion on that subject. In the present case there is no pretence for complaint of oppression or vexation by the plaintiff, and on the facts disclosed by the affidavits there was reasonable cause for the arrest for the higher sum. Were the act to be construed to be imperative, as is contended, the consequence would be, that a failure at a trial to prove one item of a long account would impose the burden of costs on the plaintiff, though he might be disabled from giving the requisite proof by some unforeseen accident or the momentary absence of a witness.

BOLLAND B.—I am of the same opinion, on the ground that the defendants do not show that they ever told the plaintiff that the sum was returned. If this enactment was construed to be imperative, the proviso subjoined to it would be deprived of the effect which in my opinion the legislature meant that it should produce.

GURNEY B.—There was reasonable and probable cause for the plaintiff to arrest for the higher sum, when on his application for it the defendant made no objection to any item, and promised to pay the whole.

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Rule refused.

See *Linley v. Bates*, vol. ii. 753, and *Roe v. Rhodes*, Mich. 1833, and Hil. 1834.

LAWSON *against* CASE.

A Rule had been obtained by *Mansel* to set aside the writ for a clear irregularity. On showing cause, *Thesiger* objected that the affidavit of the defendant on which the rule had been granted was defective in beginning thus: "*J. Case*, the above-named defendant, maketh oath," &c., without giving any addition to the deponent. The *Reg. Gen. Hil. 2 W. 4. No. 5*, [*ante*, Vol. II. 341,] orders that "the addition of *every* person making an affidavit shall be inserted therein." The rule therefore includes *defendants*. That was the former practice of the K. B. by *Reg. 1 of Mich. 15 Car. 2 (a)*; while in C. P. if a defendant's affidavit stated his name and place of abode, it was sufficient, without stating his addition (*b*); and the object of the rule was to assimilate the practice, where, as in this case, it differed.

An affidavit by the defendant in a cause must state his addition according to *Reg. Gen. Hil. 2 W. 4. No. 5*; and the describing him as "the above-named defendant" makes the affidavit irregular.

Mansel contra.—There is no necessity that the rule should apply to parties in the cause. The plaintiff must know the defendant's addition.

(a) Cited *Jervis's Rules*, 53 u.

(b) *Anonymous*, 6 Taunt. 73.

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Lord LYNTHURST C. B.—The object of the General Rules was the furtherance of certainty and precision. It is safer to acquiesce in the strict terms of the rule now under discussion, and to require the addition of the deponent though he be the defendant. The affidavit is defective.

Rule discharged with costs as moved.

LAWSON *against* ROBINSON.

Short notice
of trial in coun-
try causes
means four
days peremp-
torily, what-
ever may be
the state of
the pleadings.

HUTCHINSON had obtained a rule to set aside a verdict for the plaintiff at the last *Yorkshire* assizes, and for a new trial on the ground of irregularity.

The defendant having obtained time to plead, and being under terms to take short notice of trial, the plaintiff gave him a notice of trial less than four days before and not excluding the commission day, viz. on the 27 *Feb.* for assizes held on 2d *March*, so that the first day as well as the last was reckoned inclusively, contrary to *Reg. Gen. H. 2 W. 4.*, No. 58, [*ante*, Vol. II. 345,] and Rule VIII. [*id.* 352.]

Alexander showed cause. The rejoinder was not delivered till the 27th *February*, so that the plaintiff had no earlier day to give notice in. Then the defendant's own delay in delivering the rejoinders so late occasioned the period for giving notice to be contracted to a less time than that fixed by the rule No. 58. That rule therefore does not apply. But

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must mean four days peremptorily, whatever may be the state of the pleadings. The general rule applies. The plaintiff's attorney, when before the judge on the summons for time to plead, might have saved the assizes, by stipulating that if the issue for trial was not raised in time to give the regular notice, two days notice should be sufficient.

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SWEETLAND *against* SMITH.

ASSUMPSIT. The 1st count became immaterial, being on an agreement of a date prior to that declared on in the 2d count, and which was in substance embodied in the latter.

The 2d count, after reciting a request of defendant to plaintiff to lend him 4000*l.* at 5 per cent. interest, on the security of freehold and copyhold premises of defendant, situate &c., stated an agreement made 20 *August* 1831, between the plaintiff and defendant, that defendant should in a week from that date make and deliver to the said plaintiff or his solicitor a complete abstract of the defendant's title to the said premises, and produce to the plaintiff's solicitor, at some convenient place within the city of *London*, the title deeds

By agreement in writing preliminary to an intended mortgage the plaintiff undertook to advance the defendant a sum on the mortgage of certain named premises; the defendant was to deliver a complete abstract of title to the plaintiff's solicitor within a week after the date of the agreement, and to produce the title deeds ne-

cessary to verify the abstract and deduce a marketable title within a month from such delivery. If the defendant did not do so at either period, the plaintiff was to have the option of considering the agreement void. It was then agreed that the defendant should forthwith pay the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts were delivered but disclosed no title to some, and a defective title to other parts of the premises. The time for completing the title expired on 24 *Sept.* 1831, but the negotiations went on till 14 *May* 1832; the defendant had repeated notice between those dates that the plaintiff's money was lying idle, but he tried to amend his title till the latter day, when it remained defective and the bargain was broken off. Held, that the original contract remained in force, and that its terms were not sufficiently comprehensive to enable the plaintiff to recover interest, or more than the costs of investigating the defendant's title.

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necessary to verify the same, and deduce and show a marketable title to the fee-simple and copyhold fee thereof respectively, within one month after the delivery of such an abstract or abstracts, and that the defendant and all necessary parties should, on payment of 3800*l.*, part of the said 4000*l.* by plaintiff, execute proper conveyances, surrenders and assurances, for conveying, surrendering, and assuring the said premises unto or to the use of, or in trust for, the said plaintiff, his heirs or assigns, or to such uses as he should appoint, subject to redemption on payment by defendant to plaintiff of 3800*l.*, and the further sum of 200*l.* in case the same should have been advanced, as in the said agreement mentioned, with interest thereon on the expiration of three calendar months from the date of the said indenture of mortgage, with all usual mortgage covenants and powers of sale, on default in payment of the said mortgage money or the interest. The declaration here stated the stipulations in the agreement for the execution by the defendant to the plaintiff of a bond for 8000*l.*, and of a warrant of attorney authorizing any attorney of K. B. to confess judgment in an action of ejectment to be brought against the defendant and his heirs for recovery of the last-mentioned premises or any of them; and which bond &c. were to be declared to be only for securing to the plaintiff, his executors &c., the said sum of 3800*l.* or 4000*l.*, as the case might be, and interest, in manner aforesaid. The count then stated that it was agreed that the plaintiff's solicitor should prepare the said conveyances, surrenders, assurances, bond, warrant of attorney, and any other deeds and assurances which might be requisite to perfect the title to the said premises; and that the expenses incurred by the plaintiff in the investigation of the title to the premises, and of all such conveyances, &c., and of procuring the

plaintiff's admission to the said copyhold hereditaments, should be borne and paid by the defendant, his executors, &c., and that if the defendant should not within one week after the date of the abstract deliver such abstract or abstracts of title as aforesaid, and produce the said deeds and evidences of title in manner aforesaid, and within one month after the delivery of such abstract deduce a marketable title to the fee-simple of the freehold and copyhold fee of the said copyhold hereditaments, free from incumbrances, the said agreement on the part of the plaintiff should be utterly void, notwithstanding any rule, if such rule there was, that time could not be made of the essence of a contract; and that the defendant, his executors or administrators, should forthwith pay to said plaintiff, his executors or administrators, all costs and charges incurred by him or them in investigating the title to the said premises, and of any deeds or other instruments which might have been prepared in consequence of the said last-mentioned agreement, if the same should have been prepared at the desire of said defendant or his solicitor; and that the plaintiff agreed that on the delivery of the abstract and title deeds, and making a good title by the defendant, and upon the execution of such conveyances and assurances as aforesaid, he should and would lend the defendant the said sum of 3800*l*. on the security last aforesaid, and should lend defendant 200*l*. more when the defendant should have disbursed that sum in rebuilding the farm-house on the said premises, and produce a certificate thereof verified by affidavit, sworn before any justice of peace, or master in chancery, in ordinary or extraordinary; and it was lastly agreed that all the costs and expenses of or incident to the said agreement should be borne or paid by the said defendant, his executors or administrators. Mutual promises. Averment of plaintiff's

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readiness to perform the agreement and lend the said sums according thereto. Request by him to the defendant to deliver the abstract of title to his solicitor. Breach, that defendant did not nor would within the space of one week from the date of the agreement, or at any time before or since, make and deliver to the said plaintiff or his said solicitor a complete abstract or complete abstracts of the title of him the said defendant to the said freehold and copyhold premises, but hath hitherto wholly neglected &c. so to do. By reason whereof the plaintiff had lost all the benefit and advantages which he would have derived from the completion of the said mortgage, and had been put to great expense, to wit, 50*l.*, in endeavouring to procure the said abstract and abstracts, and to get said mortgage completed; and hath also lost all profits which he might otherwise have acquired by employing and using 4000*l.* provided and kept by him the said plaintiff for the completion of the said mortgage. Averment, that the expenses incident to the last-mentioned agreement amounted in all to 50*l.*, that the defendant had notice thereof, and was requested to pay the same according to the tenor of the agreement and of his promise, but did not pay it.

Third count stated the same agreement, but alleged as a breach that the defendant did not make a good and marketable title within a month from the delivery of the abstracts. The common counts and an account stated.

The items of the plaintiff's particulars of demand were, 1st, 27*l.* 11*s.* 10*d.* expenses of journies, &c. and investigating defendant's title to the premises under the first agreement. 2d. 41*l.* 4*s.* 8*d.* similar expenses upon the second, and 104*l.* interest on the sum to be lent, in all 172*l.* 16*s.* 6*d.* The facts proved at the *Guildhall* sittings after *Michaelmas* term before *Bayley*

B. appeared to be these :—The abstracts of title were delivered to the plaintiff according to agreement, but were defective in several particulars, and no title at all was shown to 30 acres, part of the lands mentioned. The title ought to have been completed on *24th Sept.* 1831, but the negotiation continued till *14th May* 1832; part of the money was lying idle in the hands of the plaintiff's solicitor at the time the agreement was made, and the rest was paid into his hands just before the *24 September*. From that day down to *1st March* 1832 the defendant had repeated notice that the money was lying idle, but he endeavoured to amend the title till the *14th May*, when he insisted it was complete, and refused to do any thing more to perfect it. It was however defective.

The plaintiff's counsel sought to recover interest at 5l. per cent. from the *24th September* 1831, the day when the title should have been completed, to the *14th May*, when the negotiation was broken off. The defendant's counsel objected, 1st, that upon the maxim *expressum facit cessare tacitum*, the plaintiff was estopped from claiming interest, it being specifically provided by the agreement that if the defendant failed to make a good title in a month the plaintiff should be paid the expenses of investigating it; and 2dly, that at all events such interest could not be recovered without a count on an agreement to make a title generally without reference to time. That must have been the contract intended by the parties during the time that they continued to negotiate after the time originally fixed for completing the agreement.

A verdict was entered for the plaintiff for 175l. 15s. 8d., subject to a motion to reduce that sum by the amount claimed for interest.

A rule having been obtained accordingly,

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Cleasby showed cause. No question is here raised on the general right of a mortgagee to recover interest on money kept idle in his hands past the time fixed to complete the mortgage, but the defendant contends that that general right is precluded by the pleadings in the case and the agreement stated in them. The agreement itself, however, has no such effect. The clause which, in contemplating the defendant's omission to deliver abstracts and make a good title, stipulates that he shall repay the plaintiff all costs incurred by him in investigating the defendant's title, does not show that the further damages occasioned by loss of interest from the defendant's breach of agreement, are not also recoverable. The maxim cited might apply if interest was sought to be recovered on an implied contract to pay it. The plaintiff however claims it as one part of the legal damages sustained by the defendant's general breach of contract, and contends that the express stipulation to pay another part of them does not destroy his right. Suppose a specific penalty had been fixed on for non-performance of this contract, the damages recoverable by the plaintiff would not have been confined to the sum in the penalty, and he might have compelled the defendant to pay de hors the contract a higher amount for general damages consequential on the breach of it, *Harrison v. Wright* (a), *Winter v. Trimmer* (b). But the plaintiff contends that the stipulation said to bar his claim for interest is confined to an event which has not occurred, viz. to that of the contract being off at the expiration of a week or month, as it might be. Then no compensation has been received for interest lost in the time during which the parties went on with the contract after those periods had expired.

(a) 13 East, 343.

(b) 1 Bla. R. 395.

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Next, the contract has been properly stated by the plaintiff in the second count, so as to entitle him to recover interest as a consequence of its breach. It states the plaintiff to have been *at all times* ready to perform his agreement and advance the money, and that the defendant had notice thereof, but did not within a week from the time of making the agreement, or *at any time*, deliver the complete abstracts of title. Suppose the contract for delivery of abstracts to have been agreed to be performed in a week, then, as the abstracts produced failed to show title to 30 acres of the land, the second breach was proved. But as it is clear that the loss, though not necessarily flowing from that, arose in consequence of the breach of contract, there is nothing to prevent the plaintiff from recovering damages; for the accruing of interest on the sum kept unemployed, though not necessarily consequential on the breach of contract, was for the defendant's benefit, it being for his advantage that the contract should be proceeded with. He was a party to the extension of dealing upon the footing of the old agreement, as far as it was applicable to the parties' new position. In *Marshall and Another v. Poole* (a), interest was given on an indebitatus count for goods sold, where it appeared that the contract was to pay in bills which would have carried interest had they been given. Here the old agreement to deliver the abstracts remained in force between the parties, with an extension of time by mutual consent. *Warren v. Stagg* cor. *Buller J.*, cited in *Little v. Holland* (b), and *Cuff v. Penn* (c), show that such lapse of time had not the effect of setting up a new contract, but of continuing the old one. In Lord *Ellenborough's* words in *Cuff v. Penn*, "it is admitted that there was

(a) 13 East, 98.

(b) 3 T. R. 591.

(c) 1 M. & S. 21; see also 6 T. R. 684, 8 id. 57, 281; *Willes*, 44; 6 East, 537.

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an agreed substitution of other days than those originally specified for its performance; still the contract remains." Then the declaration must be framed on the original contract. But the contract is not wholly for delivery of abstracts within a week, and the second count is framed on that view. The early clause where the defendant undertakes to deliver complete abstracts in a week, must be taken with that which subsequently declares that, in case complete abstracts are not delivered within a week, the agreement on the part of the plaintiff shall be void if he shall think proper. Both together show a contract to deliver abstracts generally, but that if not delivered in a week the plaintiff had an option to put an end to the contract. That he did not so exercise it, appears from the averment in the second count, of readiness on his part *at all times* to perform it; and his rights are the same on that count as if no particular time had been specified.

Butt in support of the rule. It is argued that the mere enlargement of the time in which a contract is to be performed does not make a new one; if so, all the terms applicable to the shorter period originally agreed for rule the extended time also. Then no additional damages can be recovered beyond what were originally stipulated for. *Harrison v. Wright* decides that an arbitrator is bound to give the real amount of damages sustained by breach of contract, though they exceed a penalty fixed; but this case resembles the cases of liquidated damages, where a party is confined to the recovery of that particular amount of damages which he has contemplated. If *Marshall v. Poole* is not in effect overruled by *Calton v. Bragge* (a), *Higgins v. Sargent* (b),

(a) 15 East, 226.

(b) 2 B. & C. 348.

and *Page v. Newman* (a), it only shows that interest may be allowed, where it would have accrued had the original promises been performed. But that does not help this plaintiff, who has expressed the damages which the defendant was to pay in case he did not deliver the abstracts within the time, so that no additional damages can be recovered for the lapse of time subsequently agreed to. If the plaintiff, after stipulating for particular damages, contends that the law would have allowed him more if he had not so stipulated, it is an answer to say, that had he stipulated for more than the law would have allowed him, viz. not only for the costs of investigating the title and interest, but also for any loss incident to selling out of the funds, the defendant could not have resisted payment on the ground that the law would only have allowed the two first items. As the express agreement to give more than the law allowed would have there prevailed, the same construction must be given to it where it stipulates for less. Nor does any hardship on the plaintiff arise so as to justify departing from the contract; for as he was not obliged to advance the money before the conveyances were executed, he was not called on to sell out of the funds before. In *Grimman v. Legge* (b), *Bayley J.* said, "Where there is an express contract between the parties none can be implied. The plaintiff therefore having destroyed his right to recover the rent according to the contract, has destroyed it altogether;" and cited *Cook v. Jennings* (c). There, a party by agreement engaged to pay freight on a ship's arrival at a specified port; she never arrived at that port, but landed her cargo at an intermediate point, where it was accepted by the freighter; and it was held, that the plaintiff was not entitled to recover a propor-

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(a) 9 B. & C. 378, 380. See now 3 & 4 W. 4. c. 42. s. 28.

(b) 8 B. & Cr. 326.

(c) 7 T. R. 381.

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tionable part of the freight for such part of the voyage as the ship performed, because where there is an express contract the law will not imply one.

It is contended that there was here but one, *vis.* the old agreement, and that that continues in force. But the going on to complete the contract after the stipulated time is only evidence of an agreement to abide by the old terms as far as they are compatible with the extension of time. The situation of the parties resembles that of a tenant holding over after the expiration of his lease, who is subject to its terms as far as is consistent with the nature of his new holding. That part of the old contract which stipulates for payment of the costs only, is not inconsistent with the new bargain for the extension of time; it must therefore apply to and form part of it; and though new dates by parol may be embodied in the original agreement, a new claim for interest cannot be introduced into it; at all events, not by implication; and if the plaintiff had intended to claim interest after the expiration of the time originally fixed, he should have expressly stipulated for it, and have declared accordingly. In the present case, then, as it was right to declare on the original agreement, its terms preclude the recovery of the general damages sought.

Cur. adv. vult.

The judgment of the court was now delivered by

BAYLEY B.—This was an action on two agreements, and the plaintiff had a verdict for 17*l.* 15*s.* 8*d.* Upon the first agreement no question arose, but upon the second, which was stated in the second count, leave was given to move to reduce the verdict by 10*l.*, which was claimed for interest. The remainder was recovered for the costs of investigating the titles of the defendant to certain lands. The defendant stood in the situa-

tion of intended mortgagor; the plaintiff in that of intended mortgagee. The agreement in the second count was preliminary to the mortgage secondly intended. That agreement contained the following stipulations important to the decision of this case, *vis.* that "within one week from the date of the agreement, the defendant should make and deliver to the plaintiff or his solicitor a complete abstract or abstracts of the title of the defendant to the said freehold and copyhold hereditaments and premises, and produce to the solicitor of the plaintiff, at some convenient place in the city of *London*, the title deeds necessary to verify the said abstract or abstracts for comparison therewith, and deduce and show a good marketable title to the fee simple and copyhold fee thereof respectively, within one month after the delivery of such abstract or abstracts." And that if the defendant should not within a week deliver such abstract and produce the title deeds, and within a month after delivery of the abstract deduce a marketable title, then the plaintiff was to have the option to consider the agreement void, notwithstanding any rule that time cannot be made the essence of a contract.

A provision respecting damages then follows, "that the defendant shall forthwith pay to the plaintiff all costs and charges incurred by him in investigating the title to the premises, and of any deed or other instrument which may have been prepared in consequence of the said agreement, if the same shall have been prepared at the desire of the defendant or his solicitor."

Now, when parties are about to enter into a contract for a mortgage by one to the other, they may prescribe such terms, with a view to coming events, as in their discretion they may think fit. They may then extend the limit to which the damages occurring on a particular contingency ought to extend; and therefore, after reading the words "all costs and charges incurred by

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the plaintiff in investigating the title to the premises, and of any deed &c. by which that limit is fixed;" it is impossible to say that they are sufficiently large to cover the interest of money lying idle during the continuance of the treaty. For I think that the costs incurred in investigating the defendant's title mean only those which occurred in so doing. The plaintiff at the time knew his situation in regard to the mortgage money, and might have bargained that if the mortgage should not ultimately be carried into effect, and he should not have the benefit of it, the loss of interest should be borne by the defendant. But if an express bargain is made that the mortgagor shall on a certain contingency pay certain damages, and the terms of that bargain are not large enough to include the interest, the plaintiff cannot claim it if the mortgage does not take place, and the mortgagor rescinds the contract. Then are the terms of the bargain large enough to cover the interest? They are totally silent as to interest on the money intended to be advanced and lying idle in the interval. Then it seems to me, that had the mortgage ultimately taken place the claim to interest could not have been sustained.

But in this case the parties continued in treaty for several months after the five weeks originally fixed for delivering the abstracts, producing the deeds, and completing the title. It seems to us, and the other judges to whom we have spoken concur in our opinion, that that fact makes no substantial difference. The plaintiff might at the end of a week have treated the contract as null and void, but he does not do so, and goes on with it. Then he goes on the same terms as in the original agreement, no new bargain being come to on that subject. He might have said, "I will go on with the agreement, but I insist on receiving interest for my money which is lying idle;" he does not do so, and as nothing is said on the subject, it appears to us that

the liability of the defendant during the subsequent period of time is to be regulated by the original contract. That specifically stipulates for payment of all costs and charges incurred in investigating the title; and that seems to us to be the extent of the liability of the defendant. We are therefore of opinion that the item for interest was improperly allowed, and that this rule should be made absolute for reducing the damages by deducting its amount from the verdict.

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Rule absolute.

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ON the 4th day of the term, *Miller* moved for a rule to show cause why the defendant should not be discharged out of the custody of the warden of the Fleet, on the ground that the plaintiff had not proceeded to execution in due time. Judgment having been signed against the defendant on the 5th *July* 1832, he was rendered in discharge of his bail on the 6th *November*, the fifth day of *Michaelmas* term, but was not charged in execution till the first day of this (*Easter*) term. Just after *Michaelmas* term there had been an application, on behalf of the defendant, to postpone charging him in execution, on his attorney consenting in writing that no advantage should be taken of such postponement. The plaintiff's attorney agreed to this, but in the *Hilary* vacation the defendant took out a summons for a supersedeas. The question at chambers being, whether the defendant's attorney had his client's authority to give the consent, the baron adjourned the decision in order to the producing affidavits on that subject. Notice of the present motion was then given.

A prisoner in execution who has become supersedeable on the ground of not having been charged in execution during two terms, is entitled to his discharge, notwithstanding he is afterwards charged in execution on the same judgment before the motion for a supersedeas.

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Platt showed for cause, that the defendant, not having been superseded before he was actually charged in execution, came too late to move for his discharge after he had been in fact so charged in execution. *Tidd* lays it down too largely, that a plaintiff cannot take or charge a defendant in execution if he be superseded or supersedable for want of being charged in execution; for in the cases he cites, the prisoner was superseded, and so discharged from liability to process against his body on that judgment (a).

Miller (*Follett* with him) contended that a plaintiff could not be relieved from the necessity to charge a defendant in execution within the second (*Hilary*) term, without the written consent of the defendant's attorney, expressed to be at the defendant's request. *Reg. Trin.* 26 & 27 G. 2. s. 11. *Scacc.* [*ante*, Vol. I. Appendix, No. I. page xiv.] and the corresponding rule in K. B. *Hil.* 26 G. 3., *Tidd*, 9 ed. 354; and that the defendant having become supersedable at the end of *Hilary* term, for want of such written consent, remained entitled to that benefit notwithstanding he had been subsequently charged in execution (b).

Cur. adv. vult.

The opinion of the court was afterwards delivered by

(a) 9th ed. 367.

(b) He also cited *Morland v. Warton*, 3 Dowl. & R. 81; *Pierce v. —*, 1 Wilson, 297; *Morris v. M'Grath*, 3 Brod. & B. 301; *Line v. Lowe*, 7 East, 330, Barnes, 376; *Blandford v. Foot*, Cowp. 72; *Rose v. Christfield*, 1 T. R. 591; *Filkes v. Allen*, 2 Stra. 1153; *Heaton v. Whitaker*, 4 East, 349. On the construction of *Reg. Hil.* 26 G. 3. *Smith v. Jeffreys*, 6 T. R. 776, and *Reg. Gen. K. B. Mich.* 1816, 5 M. & S. 522.

BAYLEY B.—In this case the question was, whether the defendant was entitled to be discharged out of custody, on the ground of his not having been charged in execution during two terms, he not having been, in point of fact, superseded, though he was supersedable on the above ground.

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By the rule of all the courts, *Hil. 2 W. 4*, No. 85, the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one.

In this case an application was made to my brother *Vaughan* in the course of the last vacation to discharge the defendant, because he had not been charged in execution in *Hilary* term, that being the last of the two terms. On the hearing of that application, which was subsequently adjourned for the purpose of further affidavits being produced on the subject of the treaty or agreement, on the ground of which the application was opposed, the exact language of the rule *Trin. 26 & 27 G. 2. (a)*, was not adverted to. By that rule, no treaty or agreement is sufficient to prevent a *supersedeas* unless it be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant, and it be expressed therein that proceedings are stayed at the defendant's request.

It is therefore essential that there should be something in writing to show that the proceedings are stayed at the defendant's request. In the present case there was a written document, but it did not state that the proceedings were stayed at the request of the de-

(a) In Exchequer, see Vol. I. Appendix, No. I. ps. xiv. Mann. Exch. Pr. Appendix, §16. See the corresponding rule in K. B. *Hil. 26 G. 3.*

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fendant. It was by his consent, but did not import to be at his request.

It was insisted that a notice given by the defendant, that he would not proceed on the summons, was a waiver of his right to make a further application to be discharged; but we think that that circumstance cannot be considered as a waiver. The prisoner might not be, and probably was not, aware of the language of the former rule; he might not be able to bear the further expense of attending on the summons, or he might be willing to stay in prison until the succeeding term, in order then to make an application to the full court, so as to obtain a final decision. We think that it would be hard upon a person in the situation of a prisoner, to hold such a notice to be a waiver. At an early period of the present, being the next ensuing term, he does apply; but, in the intermediate time, he is charged in execution on a *habeas corpus ad satisfaciendum* in this term; and it is said that after being so charged he comes too late, because, as it is contended, the nature of the custody is changed. I take it not to be sufficient for the purpose of the exception from the general rule, that the nature of the custody should be altered by charging him in execution; but that the nature of the custody must be changed before he is supersedable for not being so charged. It is different where the defendant has been in custody on mesne process only, and, before any attempt to charge him in execution, the nature of the custody has been changed.

The distinction taken by Mr. Tidd (a) is that on

(a) 1 Tidd, Pr. 9th ed. 367, 8th ed. 375. "If the defendant be superseded or supersedable for want of proceedings *before* judgment, the plaintiff may, nevertheless, take or charge him in execution at any time *after* judgment. But he cannot do so if the defendant be superseded or supersedable for want of being charged in execution, his only remedy in that case being by action of debt upon the judgment."

which the court acts. If a party be entitled to his *supersedeas* before judgment, he may, nevertheless, be charged in execution afterwards, because, by the judgment, the custody is changed; but, if he be entitled to his *supersedeas* after judgment he cannot be detained or charged in execution. The plaintiff's only remedy then is by suing out a new writ in an action on the judgment. There must be that step, and he must proceed to judgment in that action before he can charge the defendant in execution. In the case of *Wright v. Kerswill* (a), which appears to have been referred to by Mr. *Wigley* in moving for the rule in *Line v. Lowe* (b), it was determined that the defendant, having been discharged by *supersedeas* before judgment, was not finally discharged, but *after* judgment was liable to be taken in execution; though where a defendant is superseded *after* judgment for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution. Therefore, if the defendant, for want of being charged in execution, has been superseded, or entitled to be superseded, for there is no difference between the one and the other, the plaintiff is not at liberty afterwards to charge him in execution.

The case of *Line v. Lowe* (c), which was under the consideration of the court of K. B., proceeds on the ground I have mentioned. The defendant in that case had been in custody on mesne process, and had been superseded for want of being charged in execution within two terms after final judgment, and he was afterwards taken in execution upon a *capias ad satisfaciendum* issued upon the same judgment. A rule for his discharge having been obtained, *Rose v. Christfield* (d) was referred to, as qualifying the generality

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(a) Barnes, 376.

(b) 7 East, 330.

(c) 7 East, 330.

(d) 1 T. R. 591.

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of the rule, that a prisoner once supersedable is always supersedable; and restricting it to cases where a prisoner remains in the same custody and under the same process. The court took time to consider, and Lord *Ellenborough* afterwards stated that the rule was, that if the defendant is superseded for want of proceedings before judgment, the plaintiff may, after obtaining judgment, take the defendant in execution; but otherwise, if the defendant is superseded for want of being charged in execution.

In reality, a plaintiff has the defendant in custody for two terms, and he has during that period his election whether to proceed against the goods of the defendant, or to charge him in execution. If he does not so charge him within that period, the defendant is entitled to his discharge under the recent rule. We come to this decision with great reluctance, because, if the defendant knew his rights, his conduct to the plaintiff has not been fair, and he has been guilty of a gross fraud; but looking at the rules and authorities, we consider ourselves bound to say, that the defendant is entitled to have this rule made absolute.

Rule absolute.

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IN THE EXCHEQUER CHAMBER.

SMYTH *against* LATHAM.

(In Error on a Bill of Exceptions.)

Before TINDAL C. J.—Lord LYNTHURST C. B.—
PARK, BOSANQUET, and ALDERSON, Justices.—
BAYLEY and VAUGHAN Barons.

ASSUMPSIT for money had and received. At the trial before Lord Tenterden C. J. at the *Middlesex* sittings after *Michaelmas* term 1832, the plaintiff put in a document dated 21 June 1811, under the hands and seals of *S. Perceval* and others, commissioners of the treasury, by which, after reciting the appointment of *Planta*, *Nevinson* and *Jadis*, by writing or constitution dated 22 April 1811, to the office of paymaster or paymasters of all money received and set apart at the exchequer for paying off exchequer bills then existing, or in future to be issued, at a salary of 400*l.* a-year each, and the subsequent resignation of *Planta*, the plaintiff was appointed, together with *Nevinson* and *Jadis*, to be such paymaster or paymasters, subject to the orders of the commissioners of the treasury, at the salary aforesaid, to be retained and kept by the plaintiff from the day of the date thereof, quarterly, out of monies which had been imprested to *P. N.* and *J.*

By the statute 48 G. 3. c. 1. s. 10. the six commissioners of the treasury shall and may, from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit, to be the paymaster or paymasters of exchequer bills, and by s. 12. such paymasters are to have and receive such salaries and allowances as the commissioners for the time

being shall direct to be allowed them; but there was no express enactment that the commissioners might remove such paymasters at pleasure. Held, that the office of paymaster of exchequer bills is an office during pleasure only, and not for life or during good behaviour.

Seemle, that the appointment of a new paymaster reciting in the instrument of his appointment that a former one had resigned, is a revocation of his appointment, whether he has in fact resigned or not, particularly if the former paymaster sue for the emoluments of his office, as having been received to his use by his successor; and that such revocation may take place, though no power of revocation is reserved in the first appointment, and no actual revocation is stated in the second.

The fact of the former paymaster's resignation need not be proved by the new one in an action against him by his predecessor for fees received to his use, though it is stated in the successor's appointment to the office which is produced at the trial.

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or that should from time to time be imprested to *N. J.* and the plaintiff *during their continuance in the said trust*. Provided that the plaintiff should not intermeddle in the execution of the office till he had given security for the due execution of the office, to be approved of by the commissioners of the treasury. By certain admissions it appeared that such security had been given by the plaintiff, and that he had, under and by virtue of his appointment, performed the duties of his office, and received its salary and emoluments from 21 *June* 1811 to 11 *June* 1824, when he ceased to act.

The plaintiff then called *Nevinson*, who proved that he was then one of the paymasters of exchequer bills, having been appointed in *September* 1810, in the room of a former paymaster, who had been removed in consequence of an investigation of his official conduct before a committee of the House of Commons. The witness's appointment was produced, and contained an express revocation of that of his predecessor. He stated that since his appointment there had always been three paymasters of exchequer bills, but no more at one time, and that he believed that before 11 *Sept.* 1810, there never had been more than three at the same time. That from *June* 1811 to *June* 1824 the plaintiff, in conjunction with *Jadis* and the witness, had acted as the three paymasters of exchequer bills; that the plaintiff then ceased to act, and on 5th *July* 1824 the defendant entered on the duties of the office so previously exercised by the plaintiff. That there was an iron chest in the office of the paymasters of exchequer bills, in which was deposited a great portion of the treasure intrusted to their charge; that there were three keys to the chest, one of which was uniformly held by each of the three individuals acting as paymaster; that immediately upon the defendant entering upon the duties of a paymaster of exchequer bills the

same key which had been previously held by the plaintiff was delivered to the defendant and retained by him; that the defendant, in conjunction with *Jadis* and the witness, had acted as the three paymasters of exchequer bills from the 5th *July* 1824 to the present time; and that the defendant had been performing, during that period, the very duties of a paymaster, which would have been performed by the plaintiff, had he continued to have acted in his office, and that the defendant had received a portion of the salary and the whole of the emoluments which the plaintiff would have received had he continued to have so acted.

For the defendant it was then admitted that he had received a sum named for salary &c. in respect of such office; and an instrument under the hands and seals of the commissioners of the treasury was put in. It was dated 5 *July* 1824, and having recited the appointment of 21 *June* 1811, by which *Nevinson*, *Jadis*, and the plaintiff were appointed paymasters of exchequer bills, and also reciting that the plaintiff, "one of the paymasters &c. appointed as aforesaid, had resigned," appointed the defendant, with *Nevinson* and *Jadis*, paymasters of exchequer bills, at the same salary and on the same security as mentioned in the plaintiff's appointment.

No evidence was given of any misconduct of the plaintiff. The plaintiff relied on 48 *Geo. 3. c. 1.* intitled "An Act for regulating the issuing and paying off of Exchequer Bills," and s. 10. 11. 12. to show that his right of tenure in the office in question was during good behaviour and not during pleasure. The preamble to the first section recites, that "it is expedient that permanent regulations should be established in relation to the making out, issuing, and paying off all exchequer bills which may hereafter be issued for the raising any money under the authority of parliament."

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Sect. 10. " And whereas by reason of the *multiplicity of payments* which may be to be made in paying off exchequer bills it may be difficult, if not impossible, that *every payment* should be made by the several officers of the receipt of the exchequer; therefore, and to the end the exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills, and other charges attending the same; be it enacted, that the commissioners of the treasury shall and may, from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they shall deem necessary, to pay off and discharge the principal sums which shall from time to time be in course of payment upon any exchequer bills, and to pay the interest due thereupon, and the premium or premiums, rate or rates, which, according to any contract or contracts made, or to be made, for exchanging and circulating the said bills, or any of them, shall be due or payable to such contractors; and to take in and put upon a file or files, from time to time, all such bills as shall be paid off, to be cancelled, as the commissioners of the treasury shall direct, and to do and perform, or cause and procure to be done and performed, such other matters and things in relation to the said bills, or the principal and interest therein to be contained, as to the said commissioners of the treasury shall seem meet, and shall be by them directed to be done and performed by such paymaster or paymasters, comptroller or other officers and clerks for the time being; all which payments shall be made at an office to be kept in or near the receipt of the exchequer at Westminster for that purpose; and that commissioners of the treasury shall take, or cause to be taken, security

from every person so constituted or appointed, for his duly paying, answering, and accounting for all the monies which he shall receive, and for his true and faithful performance of his office or trust. By sect. 11, "the said paymaster or paymasters shall be subject and liable to such inspection, examination, controul, and audit, and to such rules in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster, as the commissioners of the treasury shall think fit or reasonable, to establish or appoint, from time to time, for the better execution of the intent and end of this act, and the satisfaction of the proprietors of exchequer bills" And by sect. 12, "as well the person or persons constituted, or to be constituted, paymaster or paymasters, as also the person or persons appointed, or to be appointed, to examine and controul the receipts, payments, and acts of such paymaster or paymasters, shall severally have and receive for the service of themselves, and of the officers and clerks to be employed under them respectively, and for such charges as shall be necessarily incident to the execution of their respective offices, such salaries, rewards, and allowances as the commissioners of the treasury for the time being shall judge to be reasonable, and shall direct to be allowed to them the said paymaster or paymaster, or comptroller, or to any other person or persons employed, or to be employed, under the authority of this act, or of any act or acts of parliament in relation to the making out or paying off exchequer bills: and it shall and may be lawful for such person or persons respectively to accept and receive any such salary, reward, or allowance, any former law, statute, or provision to the contrary notwithstanding."

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Lord *Tenterden* directed the jury,

1st. That according to the true intent, meaning, and legal construction of the several sections of 48 G. 3. c. 1. the tenure of the paymaster or paymasters of exchequer bills is, in law, during pleasure.

2dly. That by the legal construction of the above-mentioned writing, dated 21 June 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills only during the pleasure of the commissioners of his majesty's treasury.

3dly. That the instrument dated 5 July 1824 was a legal revocation of the above-mentioned writing dated 21 June 1811.

4thly. That the allegation contained in the instrument dated 5 July 1824, namely, that the said plaintiff had resigned his said office of paymaster of exchequer bills was a matter of no importance to the issue between the said parties.

5thly. That there was no fact at issue between the said parties for the consideration of the jury; and

6thly. He directed the jury to find a verdict for the defendant.

The defendant tendered the following exceptions to the above directions:—

1st. That by the true intent, meaning, and legal construction of the several clauses of 40 G. 3. c. 1. the tenure of the office of the paymaster or paymasters of exchequer bills is, in law, *during good behaviour*.

2dly. That even had the said act of 48 G. 3. c. 1. empowered the commissioners of the treasury to revoke and determine, *at pleasure*, the appointment of a paymaster of exchequer bills, no such power having been reserved in the deed poll bearing date 21st June 1811, those commissioners had not, by law, the power to revoke and determine the same *at pleasure*, and the

said plaintiff did then and there further insist, that there not being any limitation of estate expressed in that deed poll, by the delivery of such deed poll, a freehold in the said office of paymaster of exchequer bills passed to him the said plaintiff.

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3dly. That admitting, for the sake of argument, that which he does not admit, but denies, in point of fact, namely, that by the true intent, meaning, and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster or paymasters of exchequer bills is, in law, *during pleasure*; and admitting further, for the sake of argument, that which he does not admit, but denies, in point of fact, namely, that by the above-mentioned deed poll, dated 21st *June* 1811, he, the said plaintiff, had an estate in his said office of paymaster of exchequer bills only during the pleasure of the commissioners of the treasury; still the commissioners of the treasury who executed the above-mentioned deed poll bearing date the 5th *July* 1824, not having therein or thereby revoked or determined the above-mentioned deed poll bearing date the 21st *June* 1811, the above-mentioned deed poll bearing date 5th *July* 1824 is not a legal revocation of the above-mentioned deed poll bearing date 21st *June* 1811.

4thly. That the commissioners of the treasury, who executed the above-mentioned deed poll dated 5th *July* 1824, having therein and thereby founded their right to execute the same, solely upon the allegation that the said plaintiff had *resigned* his aforesaid office of paymaster of exchequer bills, that allegation was the only matter of importance to the issue between the said parties.

5thly. That the allegation made and contained in the above-mentioned deed poll bearing date 5th *July*

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1824, namely, that the said plaintiff had resigned his said office of paymaster of exchequer bills, was the fact, and the only fact at issue between the said parties for the consideration of the said jury.

6thly. That as no evidence whatever had been given, or even attempted to be given, at the trial of the said issue, in support of the truth of the allegation contained in the aforesaid deed poll bearing date 5th *July* 1824, namely, that the said plaintiff had resigned his said office of paymaster of exchequer bills, the said lord chief justice ought not to have directed the said jury to find a verdict for the said defendant, but ought to have directed the said jury to find a verdict for the said plaintiff.

In *Hilary* term the exceptions were argued at great length by the plaintiff in person, and by *Wightman* for the defendant.

Arguments for the plaintiff.—First exception. The rehearsal or preamble of a statute is a good mean to find out the meaning of the statute, and, as it were, a key to open the understanding thereof (a). Now the preamble of 48 *Geo.* 3. c. 1. recites the expediency of permanent regulations in relation to exchequer bills; and shows that before that act no permanent regulations were established relating to making out, issuing, and *paying off* exchequer bills, and that the enactments thereupon made were to be permanent. Section 10 empowers the commissioners of the treasury to appoint the paymaster or paymasters, but confers no express power on them to revoke or determine, at pleasure or otherwise, any such appointment to be made by them; nor are there any words from which such power can be implied.

Coupling the object of permanency of regulation disclosed in the preamble, with the absence from s. 10. of power of revocation of appointments, it must be inferred, that the holders of the office of paymaster do not hold their offices during pleasure only, but during good behaviour; per *Holt C. J.* in *Harcourt v. Fox* (a). An indefinite limitation in an act of parliament confers an estate for life. This is a public act, and passed for public benefit; see ss. 4. 11. 18. and 19. By s. 10. the commissioners of the treasury have not even a discretionary power to appoint paymasters, but are imperatively called on to do so, though they may select such persons "as they shall think fit for the office." In *Rex v. Commissioners of Flockwood Inclosure* (b), it is laid down, that the words *shall* and *may* are imperative when the clause in a statute is for *the public benefit*. The words of s. 10. "from time to time," were necessary to enable the commissioners to appoint as vacancies might happen, and cannot be construed as words of limitation of the estate of the appointee. In the absence then of any power to revoke an appointment, and of any words of limitation whatever, a person appointed a paymaster has an estate for life in his office, defeasible by misbehaviour only.

Had s. 10. empowered the commissioners of the treasury to dismiss a paymaster at pleasure, sect. 11. (which expressly ascertains the degree of controul to be exercised by them over him) was unnecessary. But the legislature by enacting s. 11. show that it was requisite to provide that sufficient controul which had not

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(a) 1 Show. 535. See per *Gregory J.* id. 523. and per *Eyre J.* id. 520, 521.

(b) 2 Chitt. R. 251. He also cited Com. Dig. Parliament (R. 22); *Rex v. Barlow*, Salk. 609; *Rex v. Havering atte Bower*, 5 B. & Ald. 691; *Rex v. Mayor of Hastings*, 1 D. & R. 148; 3 Atkyns, 166, 219; 7 B. & Cr. 266; 1 M. & R. 81.

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been conferred by s. 10, by the terms of which section an estate for life, or during good behaviour, was given. Some construction must be given to s. 11. (a), but as it gives no power to dismiss at pleasure, that authority cannot be inferred, for *designatio unius personæ est exclusio alterius* (b). Thus, though a wife convicted of adultery forfeits her dower by statute 13 *Edw. 1. c. 34.* she does not thereby forfeit her jointure because not so expressed in the statute (c).

This is not a penal act to be construed strictly, but a remedial one, which should receive a liberal interpretation (d). Before it passed, it is probable that the commissioners of the treasury for the time being appointed these paymasters. Their office was probably coeval with the origin of exchequer bills, which certainly existed in 1698, *Lane v. Cotton* (e). The paymasters seem to have been part of "the several officers of the receipt of exchequer," referred to in s. 10 of 48 *Geo. 3. c. 1.* Now as the commissioners of the treasury confessedly hold their own offices at pleasure only, they could not, before this act, grant a greater estate in any office than they themselves possessed; *Saunders v. Owen* (f).

The act 48 *G. 3.* was passed to remedy the mischief of this precarious tenure of the paymasters, and to establish permanent regulations for securing their existence. For Lord *Holt* says, in *Harcourt v. Fox*, "when men hold their offices for life, it is an encouragement for the faithful execution of their duties. It is then also

(a) See per *Holt C.J.* 1 *Shower*, 533.

(b) *Co. Litt.* 210.

(c) 3 *Peere Wms.* 276, 277.

(d) 1 *Bla. C.* 88; 3 *Rep.* 71; *Co. Lit.* 11. 42; *Johnes v. Johnes*, 3 *Dow.* 15; *Atcheson v. Everitt*, *Cowp.* 391; *Staniford v. Sinclair*, 9 *B. M.* 376; 2 *Bing.* 193.

(e) 1 *Salk.* 17; 1 *Ld. Raym.* 646; *Comyns Rep.* 100. *S. C.*

(f) 2 *Salk.* 467.

they acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not being liable to be displaced at the pleasure of those who put them in. And the grant shall be construed most favourably to answer the intents of the law makers, whose design it is to have the office well supplied, which will be best effected when the officer has an estate for life." The paymasters having been selected by the legislature to be at the head of the new office, s. 10. points out the mode by which they are to be constituted, which would not have been requisite had their constitution in its previous nature been permanent. That section is strong evidence that the legislature was dissatisfied with the tenure of the office as it then existed, and contemplated it as a mischief to be remedied, or they would not have enacted that paymasters should be constituted by a new mode (a), and they must have intended that such mode should supersede the whole with all its consequences.

Then as to the remedy intended by the statute, if it had been intended that the treasury should have the power of revoking their appointments at pleasure, the act would have expressly conferred such power, and would not have used those general terms which, according to all the authorities, clearly vests an estate for life. In *Hixon v. Oliver* (b) it is said, "powers must be expressed, not implied, and are construed strictly." In *Rex v. Lordale* (c) "where persons, as justices, commissioners, &c. have special authority by statute, they have none but what is under that statute, all other acts being void." Now in a variety of acts in *pari materiâ*,

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(a) See per Lord Holt, *Harcourt v. Fox*, 1 Shqw. 533.

(b) 3 Ves. 144.

(c) 1 Burr. 445; *Woolston v Woolston*, Bla. R. 283.

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beginning 25 G. 3. c. 10. including an act of 48 G. 3. c. 9. and coming down to the last session, the power to remove at pleasure is expressly reserved to the persons who have the authority to appoint (a). This act then must be construed with reference to those parallel enactments, which afford the inference, that had the intention of the legislature been that the tenure of the paymaster's office should be during *pleasure*, and not during *good behaviour*, express terms would have been inserted for that purpose in this as well as in those other acts.

(a) The plaintiff here cited 79 different acts of parliament, viz. :—

25 G. 3. c. 10. s. 7.—26 G. 3. c. 57. s. 14.—26 G. 3. c. 101. s. 5—38 G. 3. c. 86. s. 4.—39 G. 3. c. 13. s. 117.—39 G. 3. c. 21. s. 8.—42 G. 3. c. 116. s. 75.—43 G. 3. c. 21. ss. 2. 4. 5.—43 G. 3. c. 119. ss. 1. 5. 6. 7.—46 G. 3. c. 101. s. 6.—46 G. 3. c. 106. s. 2.—47 G. 3. c. 12. s. 1.—48 G. 3. c. 9.—49 G. 3. c. 120. s. 74.—50 G. 3. c. 43. s. 11.—50 G. 3. c. 72. s. 1.—50 G. 3. c. 103. ss. 27. 45.—51 G. 3. c. 15. ss. 5. 7.—51 G. 3. c. 35.—51 G. 3. c. 71. s. 2.—52 G. 3. c. 44. ss. 1. 4. 9.—56 G. 3. c. 63. s. 6.—52 G. 3. c. 134. s. 2.—53 G. 3. c. 107. ss. 1. 4.—53 G. 3. c. 116. s. 1.—53 G. 3. c. 121. s. 6.—54 G. 3. c. 114. ss. 3. 12.—54 G. 3. c. 131. ss. 1. 6.—54 G. 3. c. 137. ss. 2. 3. 8.—55 G. 3. c. 1. ss. 1. 7.—55 G. 3. c. 42. s. 10.—55 G. 3. c. 81.—55 G. 3. c. 107. ss. 1. 4.—55 G. 3. c. 13. ss. 6. 8.—55 G. 3. c. 190.—55 G. 3. c. 191. ss. 1. 2.—56 G. 3. c. 36.—56 G. 3. c. 62. s. 1.—56 G. 3. c. 84. s. 1.—56 G. 3. c. 128. s. 9.—57 G. 3. c. 34. ss. 6. 8.—57 G. 3. c. 107. s. 7.—58 G. 3. c. 20. ss. 2. 21. 22.—58 G. 3. c. 61. s. 1.—58 G. 3. c. 72. ss. 1. 2. 4. 23.—58 G. 3. c. 100. ss. 1. 6.—59 G. 3. c. 98. s. 11.—59 G. 3. c. 120. s. 1.—59 G. 3. c. 135.—1 G. 4. c. 39. ss. 1. 4.—1 G. 4. c. 49. s. 1.—1 G. 4. c. 69. s. 6.—1 G. 4. c. 117. ss. 2. 5. 25.—1 G. 4. c. 113.—1 & 2 G. 4. c. 57. s. 8.—3 G. 4. c. 100. s. 17.—4 G. 4. c. 23. ss. 1. 5.—4 G. 4. c. 90. ss. 4. 9.—4 G. 4. c. 97. s. 5.—5 G. 4. c. 67. s. 2.—5 G. 4. c. 82. ss. 1. 2.—5 G. 4. c. 92. s. 8.—6 G. 4. c. 106. ss. 2. 4. 7.—6 G. 4. c. 122.—7 G. 4. c. 62. s. 2.—7 & 8 G. 4. c. 53. ss. 1. 4.—7 & 8 G. 4. c. 55. ss. 2. 8.—7 & 8 G. 4. c. 58. ss. 8.—7 & 8 G. 4. c. 65. s. 4.—9 G. 4. c. 41. s. 7.—10 G. 4. c. 44. ss. 1. 10.—10 G. 4. c. 50. ss. 12. 18.—11 G. 4. & 1 W. 4. c. 14. s. 10.—11 G. 4. & 1 W. 4. c. 27. s. 15.—1 W. 4. c. 8. ss. 1. 2. 3.—1 & 3 W. 4. c. 17. ss. 1. 3.—3 W. 4. c. 113. s. 19.

Second exception. First, assuming the treasury to have power by 48 G. 3. c. 1. to revoke and determine at pleasure the appointment of paymaster of exchequer bills, they could not exercise that power in the plaintiff's instance, no such power being reserved to them in the deed poll by which he was appointed; and secondly, there not being any limitation of estate expressed in that deed poll, a freehold in the office of paymaster passed to the plaintiff by the delivery thereof. This is a deed poll not executed by the king, and therefore not to be construed by the law applicable to royal grants. Now the *Year Book* 17 Edw. 3. 45. a. cited in the case of the *Dean and Chapter of Fernes* (a) is, if a common person grant a rent or other thing which lies in grant only, without limitation of any estate by delivery of the deed only, a freehold passes. Then, though by 48 G. 3. c. 1. the commissioners of the treasury are empowered "by writing under their hands," to appoint such persons as they shall think fit to be paymasters, they are warranted by that act in the additional act of sealing, which cannot affect the validity of the instrument or make it less a writing under their hands. It is laid down in 4 *Cruise's Digest*, p. 236, that "if a power be given generally, without any restriction as to the nature of the instrument by which it is to be executed, or if words of a general nature only, such as *writing* or instrument, be inserted, it may, in such case, be executed by deed." And in page 40, treating of the statute of frauds, whereby 'writing under hand' is expressly stated as the requisite for giving effect to agreements, he says, "It was formerly held that an agreement must be sealed as well as signed, otherwise it would only be considered as a

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(a) *Davies's Reports*, 45; Co. Lit. 9 a.

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parol agreement, and that the writing was only evidence of it. But this was altered, and signing being the only thing required by the statute, was deemed sufficient." The instrument of appointment then standing as a good execution by deed poll of the power vested in the treasury, in its terms it closely follows the act, containing no limitation of estate in the office it confers, and no power of revocation. Now *Worrall v. Jacob* (a) distinctly lays down that a deed executed according to a power and containing no clause for power to revoke, cannot be revoked, though the original power contained such a clause. So that had 48 G. 3. c. 1. conferred on the treasury an express power to revoke the plaintiff's appointment of paymaster, they could not revoke it as made by deed, unless in that appointment they had reserved a power so to revoke it. Then the plaintiff had a freehold in the office during good behaviour.

Third exception. Admitting the plaintiff's appointment to be during pleasure, the defendant's deed of 5 July 1824, does not operate as a revocation of the plaintiff's deed of appointment of 21 June 1811, for it contains no clause expressly 'revoking' the plaintiff's appointment; and though it contains a clause determining his interest, viz. alleging that the plaintiff had resigned, that allegation should have been shown to be true in fact, particularly where the defendant's deed of appointment containing it was the only evidence of title produced by him. Without such proof it must be taken to be false.

Fourth exception. The only matter of importance for the jury was, whether the plaintiff had in fact resigned or not, though it was left to them as of no consequence. The deed poll of 5 July 1824, appoint-

(a) 3 Meriv. R. 256.

ing the defendant must be construed most strongly against the grantors, *Browning v. Beeston* (a), *Litt. s. 370*; and estops them from averring "any thing in contradiction to what they have so solemnly and deliberately avowed; *Co. Lit. 352 a*, *Rees v. Lloyd* (b). Its recital, therefore, of the plaintiff's resignation not having been proved, the defendant cannot set up any other right in them upon which to found their grant of the office to him.

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Fifth exception. Actual resignation of the plaintiff was the material question for the jury, for if it was not true, the office was full. In *Dyer* (c), it is laid down, that if a man grant that to one which he hath before granted to another for the like term, the second grant will be void.

Sixth exception. The lord chief justice should have directed a verdict for the plaintiff for the salary and emoluments received by the defendant, while acting as paymaster in room of the plaintiff.

Arguments for the defendant.—First, had the treasury power to revoke the plaintiff's appointment of paymaster? And secondly, if they have, have they so revoked it? which may involve the question, whether the action for money had and received can be maintained. The first question turns entirely on the 10th section of 48 G. 3. c. 1. which provides that the commissioners of the treasury shall and may from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller, and such other officers and clerks as they shall deem necessary &c. Thus they might appoint more,

(a) Plowd. 134.

(b) Wightw. 123, citing Roll. Ab. 172.

(c) 25; and see 1 Swanst. R. 106. 113; 2 Levinz, 213.

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or less persons, as the occasions of a larger or smaller issue of exchequer bills might require. *Saunders v. Owen* (a) is in favour of the defendant, for the court said, he that has an office at will cannot make a grant for life, because there is no original estate sufficient to bear it, and it would have been startling if the commissioners of the treasury, who hold during pleasure, could have appointed to freehold offices for life. Were that so, then if ten paymasters were appointed for a particular emergency, they would all be in for life, irremovably, though three might be sufficient for ordinary periods. If, as contended, the act being for the public benefit and security, is therefore to receive a liberal interpretation, it cannot be held to have contemplated the establishment of paymasters for life, each of them having in passing a control of the public treasure to a considerable amount. For exclusive of that inconvenience, the plaintiff has not shown how a paymaster may be removed for misconduct. The treasury then must have been necessarily intended to possess a discretionary power to remove and reappoint at discretion, or the words "from time to time" would be superfluous. The clauses cited from other statutes, and conferring an express power of removal, are there used only *ex abundanti cautela*.

By section 12, the paymasters are to have such salaries, rewards and allowances as the "commissioners of the treasury for the time being shall think fit." If they can alter and reduce the salaries so as to render the supposed life estate of no value, it would be palpably inconsistent if they could not remove the officer. [Lord *Lyndhurst* C. B. Do you say that section 12. empowers the treasury to reduce the salary of any particular officer?] Nothing in the act prevents them

(a) 2 Salk. 467.

from so doing, and assigning to each officer a peculiar duty and a separate reward, according to the amount of duties performed by him. The existence of that discretion is clear, it is for the benefit of the public, and is incompatible with a want of power to dismiss the officer. But the instrument of appointment of the plaintiff is not a deed poll, but a writing under seal, like an award, and if it was such a deed, still the treasury acting as public officers pursuant to a statute, could not grant a greater estate than the statute authorized them to do. So that if they have made a deed creating an estate for life, it would be void for want of adequate power in them to grant it.

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Secondly, assuming that the plaintiff held office during the pleasure of the commissioners of the treasury, have they revoked the plaintiff's appointment by their appointment of 5 *July* 1824? By the evidence it appears that there have always been three paymasters, and only three. It is inconsistent with the terms of the recital and grant in this deed to suppose that the treasury intended to appoint the defendant a fourth paymaster, and it is clear that the defendant was appointed by them in the room of the plaintiff, to act as paymaster of *all* the exchequer bills with the same two persons who had been previously appointed to act with the plaintiff as such. That appointment of the defendant to the office before granted to the plaintiff, and the fresh grant of the salaries to the defendant, and the other two, is inconsistent with the previous grant to the plaintiff, and a virtual revocation of it. In the same way the estate conferred by a demise at will, would be revoked by a demise to a new tenant.

It is next said that the recital of the fact of the plaintiff's resignation in the appointment of the defendant, imposed on him the necessity of showing that the plaintiff had resigned; and that the defect of such

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proof rendered the defendant's appointment invalid. But if the treasury could remove and reappoint at pleasure, their grant to the defendant would be generally valid, whether the grantor assigned a true or false reason, or no reason for making it. [*Alderson J.* If the right to appoint the defendant depended on the recital of the fact of resignation or removal, that might be otherwise. Lord *Lyndhurst C. B.* There appear to be no duties except such as are to be performed by these three persons.]

Then, on these exceptions, the plaintiff had no right to maintain an action for the salary and emoluments of the office held by the defendant, as for money had and received by the defendant to his use; for even if the treasury had not power to revoke, and have not revoked the plaintiff's appointment, the office conferred by them on the defendant cannot have been that of the plaintiff. He would remain entitled to it, and to his salary &c. accordingly, but the salary &c. received by the defendant would be that of his own independent office, as fourth paymaster. [Lord *Lyndhurst C. B.* If the defendant's office is a separate one, his appointment to it cannot be a revocation of that of the plaintiff; but if the defendant's is not a separate office, his appointment will be such a revocation.]

Reply by the plaintiff.—Though a *custos rotulorum*, like the commissioners of the treasury, is removable at pleasure, yet *Harcourt v. Fox* (a) shows that a clerk of the peace appointed by a *custos*, holds that office for life, whether the latter is removed or not. *Howard v. Wood* (b), *Martyn v. Hind* (c), and *Trelawny v. Bishop of Winchester* (d), show that money had and received lies for the profits of an

(a) 1 Show. 534.

(b) 2 Show. 21.

(c) Cowp. 457.

(d) 1 Burr. 219.

office taken under a claim of right. But the defendant cannot object to the form of action, as the exceptions are the plaintiff's. [*Bayley B.* You pray to have the judgment for the defendant reversed, and also to have a verdict entered for the plaintiff. Now *Vines v. Corporation of Reading (a)*, shows that on a bill of exceptions a court of error may look to the whole evidence on both sides, to see whether the verdict was sustained by the evidence.]

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Cur. adv. vult.

The judgment of the court was now delivered by

TINDAL C. J.—This case comes before us from the court of King's Bench, and the questions raised upon the record arise upon a bill of exceptions tendered by the plaintiff below, who is also the plaintiff in error, to the directions given to the jury on the trial of the cause by the late Lord *Tenterden*, then chief justice of the court of King's Bench. The plaintiff, at the trial of the cause, took five exceptions to the directions given by the chief justice to the jury, of which the first was in substance this, that, by the legal construction of the several clauses of the statute 48 G. 3. c. 1. the tenure of the office of one of the paymasters of exchequer bills is not, as was stated by the chief justice to the jury, "during pleasure only," but a tenure "during good behaviour." Upon this, the first exception, and by far the most important, as the answer to all the other exceptions appears to depend on this point, we are all of opinion, that, according to the legal construction of the statute above referred to, the tenure of the office of a paymaster of exchequer bills, is a tenure during pleasure only, and not during good behaviour, or (which is the same in contemplation of law) for the

(a) 1 Y. & J. 4.

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life of the grantee. As the office of a paymaster of exchequer bills is not an antient common law office, of which the duration and the appointment are governed by antient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself. And looking to the object of the act, the language of the act, and the various provisions contained in it, we think the meaning and intention of the legislature was, that the appointment should be during pleasure only, and not during the life of the grantee. The object of the new provision appears with sufficient certainty by the preamble to the 10th section: "Whereas, by reason of the multiplicity of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the exchequer; therefore, and to the end the exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills and other charges attending the same, be it enacted, &c." The object therefore expressed by the legislature in this preamble was, to secure the due and regular payment of the exchequer bills from time to time directed to be paid off, by giving new and additional assistance to the officers of the receipt of the exchequer whenever such assistance should be necessary. The assistance contemplated by the act was necessarily uncertain, both in its extent and its duration. The issue of exchequer bills might at one time, and under one state of circumstances, be much larger than at another; it might be large in time of war, inconsiderable in time of peace; and consequently the regular discharge of the exchequer of all monies applied to the payment of exchequer

bills might require at one time a greater and at another a smaller number of officers. Any given number of officers, therefore, however well adapted to the exigencies of the public at the time of their appointment, might be insufficient for the dispatch of business, or might be unnecessarily large at a subsequent period. Indeed, it is within the reach of possibility, that all the exchequer bills might be paid off, and no issue of any new bills take place; in which case, the officers of the receipt of the exchequer would stand in need of no assistance whatever. The object, therefore, of the act could not be that any certain, definite number of paymasters and other officers should be permanently appointed; but that there should at all times be a number adequate and sufficient for the regular payment of the bills which might be outstanding at any particular time. The *language* of the enacting part of the section leads to the same conclusion. It is enacted that the commissioners of the treasury "shall and may" (which, for this purpose, may be taken to be compulsory on them,) "from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they shall deem necessary," to pay off the exchequer bills in the particular manner stated in the 10th section of the statute. The enacting words of the clause, therefore, are equally free from any restriction as to the number of paymasters or other officers. Under these words, it might perhaps be contended that they could appoint *but one comptroller*, as only one appears to be mentioned; but they might at all events appoint as few or as many *paymasters and other officers and clerks*, as the exigency of the public service might require. They might begin with appointing *one* paymaster only, if they thought

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one paymaster and the clerks and officers under him sufficient at first; and when need required they might appoint another paymaster, and so on, from time to time, until there were as many as they thought necessary. Such is the obvious and necessary construction of the enacting words of this section. The object, therefore, of the legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour, unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be completely attained; for, if the appointment is necessarily during good behaviour, that is, for life, the commissioners of the treasury might indeed always *increase* the number when the service of the public demanded more; but they could never *reduce* the number, when, from new circumstances, it became greater than the performance of the public service required. It is therefore upon the principle that the object of the act cannot be completely carried into effect, if the commissioners of the treasury have only a power to appoint, but no power to remove, that we hold the construction of the act to be, that the power to appoint, is a power to appoint during pleasure only, and not for life. Again, the power given to the commissioners of appointing paymasters is expressed in the enacting part of the 10th section in precisely the same language as that which authorizes them to appoint "such other officers and clerks as they shall deem necessary." The same words in the same sentence must receive the same construction; but it would surely be an unreasonable construction of the clause to say, that *all the officers and clerks* appointed to assist the paymasters had a freehold interest in their office, and were not removable at the

pleasure of the commissioners. The provisions contained in the 12th section of the act appear to us to lead to the same conclusion. By that section, the paymasters are to have and receive for their services such salaries, rewards, and allowances, as the commissioners of the treasury for the time being shall judge to be reasonable, and shall direct to be allowed to them. The general terms of this provision include an authority to diminish or to increase from time to time the salaries of the paymasters just as the nature of their services deserve. The commissioners, therefore, under this section, might undoubtedly reduce the salary to a nominal sum, if the duties of the office should become merely nominal. But it is surely much more consistent with the general object of the act, that they may altogether dispense with the officers themselves when they think them no longer of use, that is, that they should have the power of removing them at pleasure, than that the officers should continue to hold their offices for life, without any real salary, and without any duty to perform; for it would seem to be an unreasonable construction of the act, to hold, that if ten paymasters had been appointed when ten were necessary, and from a change of circumstances one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but must still retain the full number, at a tenth part of the salary to each. We think, therefore, that the meaning and intention of the statute was, and consequently that the necessary construction of it must be, that the office so newly created was to be determinable at pleasure, and was not an office for life. It is objected, however, by the plaintiff in error, that the general preamble to the act contemplates the establishment for the first time of *permanent* regulations for the making, issuing, and *paying off* exchequer bills; and

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it is contended that the commissioners of the treasury have consequently only a power to select proper persons, not a power to displace or remove them. But we think this consequence does not necessarily follow. It may be true that the commissioners of the treasury for the time being have under the act a permanent power of selecting paymasters and other officers, and of making regulations; but it does not follow that the office itself of paymaster should be on that account permanent during the life of the appointee. The *regulations* established under the act for the paying off exchequer bills, will be just as permanent, whether the commissioners have the power to appoint paymasters for life, or during pleasure only. All that the statute contemplates is the permanency of the office, notwithstanding the change by the appointment of new sets of commissioners of the treasury; not the permanency of the office in a particular individual, or that the regulations which have been once made should be considered unalterable.

It is further objected, that by the 11th section, the paymasters are made subject to such rules and regulations as to the performance of the duties of their office as the commissioners shall think fit or reasonable to establish for the better execution of the act and the satisfaction of the proprietors; and it is contended that such provisions would be altogether unnecessary if the commissioners have the power of dismissal, or if the appointment were during pleasure only. If, indeed, acts of parliament never contained any thing but what was strictly necessary, this argument might be entitled to some weight; but if the necessary inference to be drawn from the other part of the act is, as we conceive it to be, that the commissioners can appoint during pleasure only, then this provision, even though in strictness unnecessary, must be considered as introduced

pro majori cantelâ only. But we think this clause is not without its use, even though the office of paymaster should be held to be an office during pleasure; for, under it, the commissioners of the treasury would have power to make regulations to bind successive paymasters once for all, instead of making them *de novo* upon each new appointment.

It is then argued, that as no mention is made in this section of the power of dismissal, it must be considered that none such exists. The answer to this argument appears to be, that the clause only refers to the duty of the officer, whilst he continues such officer, and such particulars only are mentioned as equally relate to the duties of the office, whether it be for life or during pleasure; the clause being framed with reference to the duties of the office, not to the duration of it. Upon the whole, therefore, that clause seems to leave the question where it was before.

It is further objected that the statute is remedial, and is therefore to be construed liberally; that one of the mischiefs intended to be remedied was, the want of permanency of the office of paymaster, which before the passing of the act was at pleasure only, being limited in duration to the continuance in office of the commissioners of the treasury, by whom such appointment was made. It may be granted that one object of the act was, to make the office permanent; but if the officer continues to hold his office (as undoubtedly he now will) notwithstanding the change of the commissioners of the treasury, that object is equally answered, whether the office itself be for life or during pleasure only. But then it is argued that the appointment for life is the only, or, at all events, the best mode by which the persons appointed can be expected to become qualified to perform the duties of the office. It may be, however, at least doubtful whether such

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conclusion is just, when applied to an office which is merely ministerial, and not in its nature demanding any very great extent of experience or ability, but depending for its discharge in a more especial manner on the industry, assiduity, and integrity of the officer. Lastly, it is argued that if the terms of this statute be doubtful, it ought to be construed by analogy to various other statutes cited on the part of the plaintiff, in which a similar provision as to the appointment of officers has been made; and in all of which it is urged, that whenever it is intended there should be a power of revocation or dismissal, such power is expressly reserved by the act, or the appointment itself is directed to be made during pleasure only. This kind of argument is well founded only in those cases where the construction of the statute is doubtful or obscure: but in the present case, we think the construction of this statute, for the reasons before given, is clear and unambiguous. Where, however, such powers of revocation or dismissal are expressly given by any act in which the necessary object of the act itself implies, as here, that the officer shall be appointed during pleasure only, we think, in such cases, the insertion of the power of dismissal, or of the clause that the appointment is held during pleasure only, must be referred to the principle before adverted to, *viz.* that the provision is inserted *ex abundanti* and *pro majori cautela* only.

As we think, for the reasons above given, the first exception must be overruled, those exceptions which follow will require less discussion; for as to the second exception, *viz.* that upon legal construction of what is called the deed poll, by which the plaintiff was appointed, he had a freehold in his office, the first observation which arises is, that the instrument is no deed at all. The mere annexation of a seal will not make an instrument a deed, which is not a deed in its own nature. An

award by an arbitrator, although under seal, does not thereby become a deed. And, in the present case, where the commissioners have merely a statutory power to constitute paymasters "by writing under their hands," the annexation of a seal without the requisition or authority of the statute, will not give a different effect, or impart different legal consequences to the instrument by which the authority is executed, than if the commissioners had appointed by writing under their hands only. But the more direct answer to this exception is, that if the commissioners had no authority by the statute to appoint for life, whatever may be the frame of the instrument by which they make the appointment, it cannot create a greater estate than they had power by the statute to grant.

The third exception to the charge of the lord chief justice is, that even if the deed poll of the 21 *June* 1811 granted the office to the plaintiff during pleasure only, still the deed poll of the 5th *January* 1824, is no legal revocation of such pleasure, inasmuch as it contains no distinct clause of revocation, and no provision which rendered such clause unnecessary. But, when it is considered that the subsequent appointment is that of a new officer in the stead and place of Mr. *Smyth*, it seems to bear so close an analogy to the case of tenancy at will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former; at all events, as the appointment of the defendant to the *same office*, and to the receipt of the *same salary*, is the sole ground upon which the plaintiff founds his right to recover in this action, we think it cannot be contended *by him* that such new appointment, inconsistent with the continuance of the former, is not a sufficient revocation in fact of the pleasure of

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the commissioners, that the plaintiff should continue in his office.

The fourth ground of exception is, that the commissioners having stated in the appointment of the defendant, that the plaintiff had *resigned* his office, and this allegation not having been proved, the subsequent appointment cannot operate as a revocation of the former. But we agree entirely in opinion with the late lord chief justice, that the resignation was not a fact necessary to be proved by the defendant in this cause; and that, whether the plaintiff had resigned or not, the fact of the appointment of a successor to the same office, was a sufficient indication of the commissioners pleasure, that the plaintiff should no longer continue in the possession of the office. And this gives the answer to the fifth and last exception taken, *viz.* that the defendant was bound to prove the fact of resignation. In the first place, it is no fact asserted by the defendant; but, secondly and principally, it is a fact immaterial to the issue between the parties; for, as the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor.

But we think, independently of the reasons before given for overruling the several exceptions taken by the plaintiff at the trial, that, upon another ground, he is not entitled to the judgment of this court: for either the defendant has, as the plaintiff contends, been put into his, the plaintiff's place, and appointed his successor to the same identical office, and in that case the new appointment operates as a revocation of the plaintiff's grant; or the defendant has not been placed in the very same identical office, and in that case the plaintiff's grant is still unrevoked and in existence; the plaintiff is still one of the paymasters of exchequer

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bills; and as the commissioners of the treasury are not limited in the number of paymasters appointed, it follows that the defendant has been appointed to another and distinct paymastership from that of the plaintiff. Upon the latter supposition, the money received by the defendant has not been money received in respect of the plaintiff's office, as is the case where there can be but one officer, and the officer *de facto* has received the several fees paid for performing the duties of the office; but the money received by the defendant is the amount of salary and allowances received by him in respect of his own appointment; and in that case such money cannot be money had and received to the use of the plaintiff. And indeed we cannot but think that the decision at which we have arrived, is no less consistent with the justice of the case than with the rule of law; for, it would have been most unjust, with respect to the present defendant, that, after having performed the duties of the office for nearly six years, he should be called upon to pay over the emoluments of it to the plaintiff, who had bestowed neither labour nor time in the execution of its duties; nor, for any thing that appears on this special verdict, had given any previous notice to the defendant, of his intention to dispute his appointment.

Upon the grounds above stated, we think that the exceptions tendered at the trial are untenable, and must be overruled; and that in no view of this case can the plaintiff be entitled to judgment in his favour; but that the judgment of the court below must be affirmed.

Judgment affirmed.

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IN THE EXCHEQUER OF PLEAS.

Mould against MURPHY.

Writ, declaration, and rule to plead, all occurred in the same vacation. In the next term judgment was signed. Held, good, and that it was not requisite to give a new rule to plead in the term.

THE writ was issued, the declaration delivered, and the rule to plead given in the same vacation, but judgment was not signed for want of a plea till the next term. A rule was obtained to set aside the judgment, on the ground that no new rule to plead had been given in that term; but

The Court acceded to the cause shown, *viz.* that that step was not necessary.—Rule discharged.

Richards for, *Archbold* against the rule (a).

(a) See Tidd, 9 ed. 474, *contra*, while rules to plead were entered only in term, or in four days after.

SARGENT against COWAN and Another, Sheriff of MIDDLESEX.

A sheriff obtained judgment on a bail bond, and issued a *fi. fa.* directed to the coroner, on which the plaintiff's attorney indorsed the name of a sheriff's officer as the person pointed out to

ASSUMPSIT for money had and received. The following facts were proved at the last sittings at *Westminster*. The defendants having obtained judgment against *Widgeon* in debt on a bail bond, issued a *fi. fa.* against his goods, directed to the coroner. The coroner's broker seized a lighter and sold it to the plaintiff for 25*l.* It was afterwards taken from him by persons claiming a right to it, and this action was brought to recover the purchase money as for a failure

the coroner to execute the writ. That officer took goods in execution and sold them, and received the purchase money, but did not pay it over to the plaintiff. The goods being afterwards taken from the purchaser by persons claiming a prior right, he sued the sheriff for the purchase money, as for money had and received to his use on failure of consideration. Held, that he could not recover in that action, for the act of the officer was done by him as officer to the coroner, and the sheriff was not connected with it so as to make him liable.

of consideration. The writ was produced at the trial by the coroner to whom the process had been directed, and it was indorsed by the defendants, the sheriff's attornies, with the name of *W. Simpson*, a *Middlesex* sheriff's officer. It was also shown to be the usual course of business in the sheriff's office for the plaintiff's attorney to indorse on the writ the name of the officer by whom it is intended to be executed. The sale was advertised to be by order of the sheriff, the plaintiff paid the 25*l.* to the coroner's broker, and he to *Simpson*, the officer indorsed on the writ. He was called, and assigned as a reason for not paying over the money to the defendants, that they had been paid from another quarter. *Gurney B.* held that the officer was not the officer of the sheriff of *Middlesex*, but of the coroner, so that the defendants were not connected with the officer's proceedings, and nonsuited the plaintiff.

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J. Williams moved to set aside the nonsuit, on the ground that *Simpson* the officer was an agent for the defendants as creditors of *Widgeon*, and that the course of the sheriff's office as to indorsing the writ with the name of the officer selected by them to execute it, fixed them as his employers. He also stated that the coroner proved that *Simpson's* name was indorsed on the writ when he received it.

Lord LYNDEHURST C. B.—If a man who was ordinarily an officer of the sheriff acted *pro hac vice* as officer of the coroner, he must be taken to be the servant of the coroner. I suppose that the sheriff, in such cases as these, allows the coroner to use his machinery, but when it is so used, it is the machinery of the latter. The coroner was bound by law to execute the writ, and he employs a person to do so, who when acting as

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an officer under the sheriff is liable as such, but acts here as officer of the coroner.

BAYLEY B.—If the defendant's attorney, by putting *Simpson's* name on the writ, desired the coroner to employ *Simpson* to execute it, and he was employed accordingly, he became the coroner's officer and not the sheriff's.

The other Barons concurred.

Rule refused.

FEATHERSTONHAUGH and Another, assignees &c.
against KEEN.

Costs of taxation will not be allowed as 'costs in the cause' on a defendant's undertaking to pay to assignees of bankrupt attorneys the taxed amount of a bill of costs due to the latter, and the "costs of the action."

THE assignees of *P.* and *S.* bankrupts, attorneys at *Worcester*, sued for a bill due to the bankrupts. An order was granted to the defendant to tax the bill on his undertaking to pay the taxed amount, and the costs of the action; and the officer having taxed off more than one-sixth of the bill, allowed the plaintiffs the costs of taxation as costs in the cause; but on motion to review taxation the *court* directed those costs to be disallowed.

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WHITELOCK *against* FRANCIS MUSGRAVE.

ASSUMPSIT against one of the makers of a joint and several promissory note, attested by one *William Young*, and signed by three persons; two of whom, including the defendant, were marksmen. The whole body of the note was written by the subscribing witness. Plea, general issue. At the trial at *Guildhall* at the sittings after last *Michaelmas* term, *Hardie*, the nephew of the attesting witness, swore that he was now resident in *Upper Canada*, and proved his handwriting. On cross-examination he said he did not know where either defendant or plaintiff lived, or anything about the defendant or his connexions, or about his making his mark to the note. It was objected that the plaintiff could not recover without giving some evidence of the identity of the defendant with the *Francis Musgrave* who had signed the note; and Mr. Justice *Bayley*'s judgment in *Nelson v. Whittall* (a) was cited. For the plaintiff, the practice of Lord *Tenterden* and *Best C.J.* at nisi prius, in *Page v. Mason* (b), *Mitchell v. Johnson* (c), and *Kay v. Brookman* (d), was relied on, to show that such evidence was not deemed requisite by those judges. The learned baron (*Bayley*) said, that the mere proof of the defendant's handwriting was good evidence that some *F. Musgrave* had signed that note, but that the jury must decide whether the defendant was that person. Verdict for the defendant. The learned baron gave leave to move (e) to

Where a written instrument sued on is attested by a subscribing witness who is dead or abroad out of the reach of the process of the court at the time of the trial, it is requisite to give some evidence that the party who signed the instrument is the defendant sought to be charged under it, as well as to prove the handwriting of the subscribing witness.

(a) 1 B. & Ald. 19.

(b) 1 M. & M. 79.

(c) Id. 176.

(d) Id. 286.

(e) See *Tidd*, 9 ed. 904; 2 Chitt. R. 271; without such leave the motion could only have been for a new trial; but see the end of this case.

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enter a verdict for 25*l.* the amount of the note. In Hilary term

Milner moved accordingly. The plaintiff, as payee, must have known who the party was from whom he received the note, and being in possession of it, must therefore be taken to have sued the proper person. In *Nelson v. Whittall* (a) the indorsee being plaintiff, the payee might have been called as a witness by the plaintiff (b).

In *Vin. Abr. tit. Evidence* [T b 48], the cases are collected, and it is broadly laid down that if a subscribing witness is beyond sea, or dead, proving the hand of the party is not sufficient, but proof of the absence or death of the subscribing witness and his handwriting is sufficient. In *Nelson v. Whittall* a doubt was thrown on the sufficiency of such evidence.

[Lord Lyndhurst C. B. Why was it there proved that the defendant was present in the room when the subscribing witness prepared the note, except to show his identity with the person sued? The judgment for the plaintiff turned on that circumstance. It would be very extraordinary if some evidence of identity was not necessary. As far down as *Memot v. Bates*, H. 4 G. 2. reported in *Buller's Nisi Prius*, 171 b. the rule was, that on *non est factum* a plaintiff must prove the execution of the deed, and proof of execution by one who called himself *B.* is not sufficient, if the witness did not know it to be the defendant. In *Middleton v. Sandford* (c), *Dampier J.* ruled that evidence must be given that the defendant was the person proved to have executed a bond in the presence of a witness, to whom he was previously and subsequently unknown. The

(a) 1 B. & Ald. 1. 8.

(b) Bayley on Bills, 4 ed. 422.

(c) 4 Camp. 34.

above passage, in *Buller's Nisi Prius*, 171, was also cited and acted on by *Holroyd J.* in *Parkins v. Hawkshaw* (a), where the subscribing witness to the bond stated that he saw it executed by a person introduced as *Hawkshaw*, and gave some description of his person, but could not identify him with the defendant in the action; and the plaintiff, being unable to give other evidence of that fact, was nonsuited. Were it otherwise any person of the same name might be sued with effect. Why should the onus of proving a negative, *viz.* that he is not the person named in the note, be thrown on the defendant?]

Buller J. lays down a rule in *Adam v. Kerr* (b), inconsistent with *Memot v. Bates*, *viz.* that where attesting witnesses are abroad or dead, their handwriting, when proved, is evidence of every thing on the face of the paper, and that an obligor's handwriting need not be proved. [*Bayley B.* In *Godfrey v. Norris* (c) *Coghlan v. Williamson* (d), *Wallis v. Delancey* (e), *Barnes v. Trampowsky* (f), the handwriting of the obligor, as well as that of the absent attesting witness, was proved. In *Middleton v. Sandford* evidence of identity was given. The description of the obligor generally appears on the face of a bond, but the person here making the note is a marksman, and his abode is unknown.] According to *Page v. Mann*, *Kay v. Brookman*, and *Mitchell v. Johnson*, the judge should have directed the jury that there was *prima facie* evidence of the defendant being the party signing the note.

A rule having been granted in order to review the authorities,

(a) 2 Stark. 239. (1817).

(c) Strange, 34.

(e) 7 T. R. 266 n.

(b) 1 B. & P. 360.

(d) Doug. 93.

(f) Id. 265.

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Wightman and *Addison* showed cause. The whole of this note is in the handwriting of the subscribing witness, who is gone to *Canada*. Then as a marksman cannot prove that the mark attached to his name was not made by him, this defendant is without remedy, if, as will be contended, proof of the subscribing witness's handwriting is sufficient to enable the holder of the note to recover upon it. That fact is alone sufficient to distinguish this case from actions against obligors of bonds whose names purporting to be written by themselves appear on the face of the bonds, and thus enable them to disprove their execution, by witnesses, if the signatures are not genuine. In *Nelson v. Whittall* (a), *Bayley J.* says, "It is laid down in *Mr. Phillipps's Treatise on the Law of Evidence*, that proof of the handwriting of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove not merely that the instrument was executed, but the identity of the person so executing it. But the proof of the handwriting of the attesting witness establishes merely that some person assuming the name which the instrument purports to bear executed it, and does not go to establish the identity of that person, and in that respect the proof appears to me defective." The judgment of *Abbott J.* there must be confessed to tally with his subsequent practice when chief justice. He says, "I am by no means prepared to say that proof of the handwriting of an attesting witness is not sufficient. If it had been necessary in ancient times to prove, besides the handwriting of an attesting witness, that of the party also, a great difficulty would have arisen, for in those times the parties seldom wrote, but merely fixed their marks, which

would scarcely be distinguishable from each other." That difficulty might arise if proof of the handwriting of the party were the only means of showing his identity, as the latter judgment seems to assume; but other evidence might be adduced, *e. g.* his presence at the time the note was prepared, as in *Nelson v. Whittall*, or his residence at the place mentioned in the instrument, as in *Mitchell*, executor, *v. Johnson* (a). [Bayley B. The subscribing witness, if called, might be asked as to the defendant's identity.] It is true, that Lord *Tenterden*, in *Page v. Mann* (b), held, that proof of the handwriting of a deceased subscribing witness was sufficient, but the handwriting of the defendants themselves was afterwards proved. [Bayley B. That was an action for use and occupation on an agreement for a lease, which probably described the party as living at the particular place which he had occupied, so as to connect him with the subject-matter of the action.] *Mitchell v. Johnson* (c), which was an action on a bond executed by a marksman, and attested by the plaintiff, is nearer this case. There, however, Lord *Tenterden* said, "Here is some evidence beyond the mere proof of the attesting witness's signature, *viz.* that defendant once lived at the place of which the party executing the bond was described to be." What he adds after is submitted to be extra-judicial. "If there were no other, I should have no doubt of its sufficiency. If the objection were to prevail, it would often be impossible for the obligee of a bond to recover, where the subscribing witness was dead, and the obligor a marksman." Even if the difficulty of giving some such evidence of the defendant's identity was greater than it generally is, it would not prevail against

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(a) 1 M. & M. 176.

(b) 1 M. & M. 79.

(c) *Id.* 176.

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the law or reason of the case. In *Kay and Others v. Brookman and Others* (a) *Best* C. J., in the absence of the subscribing witness abroad, acted on Lord *Tenterden's* opinion, but on the ground of convenience only. [*Bayley* B. The deed produced in evidence showed the defendants to be directors and proprietors of the *Cliff Down* mining company, and was likely to have described each as of his place of abode.] *Godfrey v. Norris* (b) and *Wallis v. Delancey* (c), earlier cases on the subject, show Mr. Justice *Bayley's* judgment in *Nelson v. Whittall* to be founded on the former law. In the first, where the plaintiff was the only subscribing witness, *Parker* C. J. thought that evidence of the obligor's handwriting, and of his letters mentioning the bond, was sufficient to entitle the plaintiff to recover; and in *Whittall v. Delancey* Lord *Kenyon* expressly required evidence of the obligor's handwriting. Again, in *Gough v. Cecil* (d), which was an action on a bond attested by two witnesses, one of whom was dead, and the other beyond the jurisdiction of the court, Lord *Loughborough* nonsuited the plaintiff for not proving the obligor's handwriting; and *Gould* J. afterwards agreed with him, though *Nares* and *Heath* Js. differed, and a new trial was afterwards granted. *Memot v. Bates* (e) and *Parkins v. Hawkshaw* (f) show it to be necessary that the witness of the execution should also know the party executing to be the defendant.

All the defendant contends for is, that *some* evidence should be given, affording reasonable ground, to identify the party sought to be charged with the party who has executed the instrument. [*Bayley* B. The

(a) 1 M. & M. 286.

(b) *Stra.* 34.

(c) 7 T. R. 26 n.

(d) C. B. Trin. 24 G. 3, cited from *Serjt. Hill's MS.* 21. p. 78; *Sel. N. P.* 7th ed. 535; and 1 *Luders on Elections*, p. 269.(e) *Bull. N. P.* 171 b.(f) 2 *Stark.* 239.

court should have reasonable ground to believe that the act of execution was done by some party answering the description of the party to be charged.] The defendant is not driven to contend that the handwriting of the party sought to be charged must be proved. That is only one mode of proof among others. In many cases the subscribing witness knows the defendant, but where, as in this case, the subscribing witness was called in to attest the execution of a stranger, the necessity arose for proving the defendant's identity of person, because the matter in issue required evidence to elucidate it, and was not proved by showing the defendant to be of the same name (*a*). Thus in an action for adultery, as the register does not prove the identity of the parties, some evidence is always given to identify the persons married with it. The like in proving a person to have been previously convicted under 7 & 8 G. 4. c. 28. s. 11.

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Milner in support of the rule. Proof of the handwriting of a subscribing witness, shown to be dead or out of the jurisdiction, is in all cases sufficient *prima facie* evidence to entitle a plaintiff to recover. He was not here called on to prove identity, for being payee of the note he must be presumed to have acted rightly, and to have sued the defendant, knowing him to be the party who signed the note. It was for the defendant to show either that he was not the person who signed the note, or to proceed criminally against the plaintiff for malpractice in attempting to fix on him a misplaced liability. [*Bayley B.* Here we do not presume but that all was *rité actum*; we take it for granted that the note in question was signed by some *Francis Musgrave*, but we do not know and can-

(a) See *Doe d. Hanson v. Smith and Another*, 1 Campb. 196.; *Hodgkinson v. Willis*, 3 id. 401; *Rex v. Morris*, 2 Bur. 1189; Bull. N.P. 239; S. C.; and see Com. Dig. tit. *De Idemnitatem Nominis*.

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not predicate that he was the defendant.] But if identity be a necessary part of the plaintiff's case, it should be made out, like other issues, by legal evidence, not by evidence leading to it short of it; now to prove the handwriting of the party sought to be charged as signing the instrument, would be contrary to the cases in which, in actions on bonds, proof of the obligor's handwriting has been held unnecessary (a). [*Bayley B.* There are other modes of giving reasonable evidence of a defendant's identity besides proving his handwriting.] The defendants having resided or being at *Reeth*, would be no evidence of his identity with the party named in the note; and if after signing the note at *R.* he removed to *London*, that removal and the service of process on him in *London* must be shown. The case in *Bull. N. P.* 171, does not affect this position, for it assumes the subscribing witness to be in the box, in which case the plaintiff must take the chance of what he may prove. *Nelson v. Whittall* first set up the necessity of proof of identity. In the older cases, collected in *Viner's Abridgment*, tit. Evidence, [T b 48. pl. 3.] the rule is laid down without making identity requisite to be proved, "where there are two witnesses to a deed who are dead, if there is full evidence to prove one of their hands, and any evidence that endeavours have been used to find one to prove the other's hand, it is sufficient, for perhaps the witness might be a stranger, and it would be a hard task to prove his hand; *Smart v. Williams* (b)." Pl. 10. "If a witness to a deed is dead, it is sufficient to prove his hand without the hand of the party." (c) Pl. 13. "If both witnesses are beyond sea, proving the hand of the

(a) *Adam and Wife v. Kerr*, 1 B. & P. 360; *Prince v. Blackburn*, 2 East, 250; *Milward v. Temple*, 1 Camp. 375.

(b) Comb. R. 248; Pasch. 6 W. & M. B. R.

(c) Per Pratt C. J. Trin. Vac. 1719.

party is not sufficient, but in such cases it is usual to prove the hand only of one of the witnesses, and that they are beyond sea, and proving both their hands is not necessary, (ut dicitur) (a). In debt on a bond upon issue of non est factum, if the plaintiff prove the witnesses dead, beyond sea, or that he has made strict inquiries after them and cannot hear of them, the plaintiff shall be let in to prove their hands (b). Though in *Godfrey v. Norris* (c), the evidence given would prove identity, it was not given with that view. The object of putting in the obligor's letters mentioning the bond, was to obviate all question, whether as the plaintiff was surviving subscribing witness as well as administrator de bonis non of the obligee, his handwriting could be admitted in evidence to charge the defendant. In *Goss v. Tracey* (d), a case was mentioned where a subscribing witness had been made executor by the obligee, and proof of his own handwriting was admitted in an action by him as executor, without mention of identity. No proof of identity of the obligor was required, where the subscribing witness was civilly dead, having been convicted of forgery; *Jones v. Mason* (e). *Wood v. Drury* (f), *Parker v. Hoskins* (g), *Milward v. Temple* (h), *Wardall v. Fenner* (i) afford a similar remark. [Bayley B. Those cases do not state that no other evidence was given, nor was it necessary they should state the evidence which was received.] *Gough v. Cecil*, as reported in *Luders's Controverted Elections*, 269, is strong for the plaintiff. It was tried at the Common Pleas sittings after Easter term 1784. Lord Loughborough thought proof

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(a) Trin. 5 & 6 G. 2. *Smith v. Richards*.(b) *Anon.* 12 Mod. 607. Per Holt, C. J.

(c) Stra. 34.

(d) 1 Peere Wms. 309.

(e) Stra. 833.

(f) 1 Ld. Ray. 784.

(g) 2 Taunt. 223.

(h) 1 Camp. 375.

(i) 2 Id. 232.

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of the handwriting of a deceased subscribing witness not sufficient without proving the obligor's handwriting, and nonsuited the plaintiff for want of such proof. But the court set aside the nonsuit, on the ground that the fact to be proved by an attesting witness is, that he saw the party execute; and if he cannot be found, his handwriting is allowed to be evidence of the fact. *Adam and wife v. Kerr* was debt on a bond, attested by two witnesses, one of whom was dead, and the other resident beyond reach of the process of the court at the trial, and it was held sufficient to prove the handwriting of the deceased witness without other proof (a). [Bayley B. That was because the evidence given substantiated every thing on the face of the paper, but that does not show that the defendant was the obligor who signed it.] *Currie v. Child* (b) is like *Adam v. Kerr*, and identity never was mentioned. Lord Ellenborough said, in *Nelson v. Whittall*, that where the subscribing witness is dead, it had been the constant practice never to look at any thing beyond his handwriting. *Cunliffe v. Sefton* (c) arose on a bond, one attesting witness to which was not to be found, and the other had since become interested as administratrix to the obligee, and was the plaintiff; but proof of the handwriting of the latter was held sufficient; and the observations of Grose J. apply. [Bayley B. Other evidence of the obligor's acknowledgment of the debt was there offered in aid of that proof. It was only refused by Chambre J. because he thought the absence of the subscribing witness not sufficiently accounted for (d).] *Vaughan* B. The point generally in question has been, whether the attendance of the subscribing

(a) 1 Bos. & P. 360. So though it did not appear that the living witness was domiciled or settled abroad; *Prince v. Blackburn*, 2 East, 250.

(b) 3 Camp. 283.

(c) 2 East, 183.

(d) That cause seems to have been undefended at nisi prius.

witness could be dispensed with or not.] *Wallis v. Delancey* does not show the necessity to prove the defendant's identity, and it was not then settled as it is now, that the obligor's handwriting need not be proved. The latter observation also applies to *Coghlan v. Williamson* (a). *Page v. Mann*, *Kay v. Brookman* and *Mitchell*, executor, *v. Johnson*, show that the modern practice supports the argument for the plaintiff. In *Mitchell v. Johnson*, the obligor was a marksman, and the subscribing witness was the plaintiff. Lord *Tenterden* held the signature of the plaintiff would alone be sufficient evidence. That answers the distinction founded on the fact of the maker of this note being a marksman.

[*Bayley B.* When a subscribing witness is called, and after proving the execution of the instrument, answers on cross-examination, that he did not know the person who executed, it is not to be presumed that he was the defendant, but the plaintiff is nonsuited. Now, according to the argument for the rule, had the subscribing witness died just before he was called, proof of his handwriting only would have enabled the plaintiff to recover. But, in the latter case, as in the present, his attestation would be evidence of every thing on the face of the instrument, *vis.* of every thing he as attesting witness asserts; now by his attestation he does not assert or attest that *this defendant* signed the note, but that some *Francis Musgrave* did. That *F. M.* is left unidentified and unconnected with the person sued; but the issue to be proved is, that *this Francis Musgrave* executed. The learned baron also cited 1 *Starkie on Evidence*, 328, 329.]

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Cur. adv. vult.

The court delivered judgment on another day in the term.

(a) Doug. 89, 93.

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BAYLEY B.—This was an action on a promissory note to which there was a subscribing witness; and the only question was, whether after his death or residence abroad out of the jurisdiction of the court, had been established in evidence, the note could be read against the defendant upon mere proof of the handwriting of that subscribing witness? The only evidence for the plaintiff was that of *Hardie*, a relation of the subscribing witness, who knew his handwriting, and that he was gone to *Canada*; but was wholly ignorant of the defendant's abode or circumstances. The note was dated at *Reeth* in *Yorkshire*, and purported to be signed by two marksmen, named *Musgrave*, their places of residence not being stated or proved. The witness *Hardie* could not say whether either of them lived or had lived at *Reeth* or had any connection there. The defendant therefore not being identified by any evidence with the party signing, the question arose whether naked evidence of the handwriting of the subscribing witness was sufficient to fix the defendant with the amount of the note.

The plea of the general issue puts the plaintiff to prove, not only that the instrument was executed, but also that it was executed by the defendant. In many cases the instrument gives some description of the party sued, *e. g.* by stating his residence or addition. His residence, if so stated, gives some ground to presume that a party proved to reside in that place, was the party signing the note. In many instances, proof of the handwriting of the party executing is given to assist the judgment in identifying him with the person sued (*a*); but this plaintiff's case rests nakedly and alone on the proof of the subscribing witness's handwriting, the evidence adduced being a mere blank as to all else. The only reasonable effect

(*a*) See the cases cited by the learned baron, *ante*, 543.

that can at the utmost be given to the attestation of the subscribing witness is this, that those facts which he so attested are the true facts of the case. Thus if the party signing is described as *A. B.* of *S. M.* in the county of *S.* clerk, the proof of the subscribing witness's handwriting at the utmost proves only that *A. B.* of *S. M.* in that county, clerk, executed the instrument. But it is still essential to give some evidence that the defendant is that *A. B.* by whom the instrument was executed. Then what does the attestation of this instrument prove in the present case? Why, that it was duly executed by a person named *Francis Musgrave*. There may be many persons of that name in the kingdom, and if the plaintiff fails to show any connection between the defendant and that *Francis Musgrave* whose signature to the note the subscribing witness attests, he does not make out that execution to have been made by *the defendant*, which it is necessary to your case to prove. For the subscribing witness's merely seeing the note executed is not sufficient (a); *by whom* it was executed is still an essential part of the inquiry in order to support the plaintiff's case, and it would not be enough if a subscribing witness was to say he saw it executed. If, on further question by whom he saw it executed, he should say, "It was executed by a man who came into the room, and who they told me was so and so, and lived at a certain place; but I do not know whether that was true, or whether he was the defendant or not," the plaintiff would make out no case. That is, because in order to recover on an instrument signed by any person, it is essential to prove it to have been executed by the defendant in the suit. On principle, some evidence must be given to identify

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(a) See observations of Gross J. in *Cunliffe v. Sefton*, 2 East, 187; *Perkins v. Hawkshaw*, 2 Stark. R. 239; *Middleton v. Sandford*, 4 Camp. 34.

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the defendant with the party who signed the instrument sued on. In *Godfrey v. Norris* (a), there was evidence of the obligor's identity, by proof as well of his handwriting as of that of the subscribing witness. In *Wallis v. Delancey* (b), Lord Kenyon required the obligor's handwriting to be proved as well as that of the subscribing witness, who was out of the jurisdiction of the court. I agree that it is not *requisite* to prove the handwriting of the party bound by the instrument, but proof of his identity with the defendant is essential; and if it is not established by proving his handwriting, *some* other evidence must be given to connect the defendant with the instrument attested by the witness. In *Nelson v. Whittall* that other evidence of identity was given.

The counsel for the plaintiff has insisted that to require such evidence of identity, would be to impose a great hardship on plaintiffs; but the hardship is no greater in these than in other cases, where a plaintiff sues without being furnished with proof that the party sued is the person by whom the instrument sued on was executed. The instrument might have described the defendant on the face of it as *Francis Musgrave of Reeth* in the county of *York*, carpenter; and if it had, the cases establish that proof of the handwriting of the subscribing witness would be sufficient to show that it was signed by a person truly described as being of that name and place, but still the plaintiff must have shown that the defendant corresponded with that description. In this, as in other cases, it may happen that if you trust the knowledge of the signature of the instrument to one witness who dies, the testimony is lost; but it might in general be supplied by proof of some acknowledgments made by the party charged on demand of payment from him, or that his residence, &c. or situation in life, tallied with the description in the instrument. By these, or

(a) *Str.* 34.

(b) 7 T. R. 266 n.

by some other means, probable evidence of identity can in most cases be given. But in the total absence of *any* such evidence in this case, it appears to me upon principle, that the mere proof of the subscribing witness's handwriting is not sufficient to connect the *Francis Musgrave* whose signature of the note he attests, with the *Francis Musgrave* who is sued in this action, or to show that the note was actually made by the latter, so as to entitle the plaintiff to recover against him.

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VAUGHAN B.—I am of the same opinion; and Lord *Lyndhurst*, who was present when the rule was granted (a), concurs with the rest of the court, that the plaintiff must fail in this action for want of proof of the defendant's identity. I agree with my brother *Bayley*, that in cases like the present, where the subscribing witness is dead, or out of the jurisdiction of the courts, there must be some reasonable evidence from which a jury can infer that the deed was executed, or the note signed by the identical party whose name appears on it. It seems to have long been a *vexata questio* in *Westminster Hall* whether any evidence was required in such cases beyond proof of the handwriting of the subscribing witness. The practice of Lord *Tenterden* and C. J. *Best* seems to have been not to require it, and the instances are collected in *Kay v. Brookman* (b). I do not agree with them, and think that some other evidence of identity, however slight, must be given *ultra* the naked proof of the subscribing witness's handwriting. Some such evidence was given in most of the older cases, as well as in *Nelson v. Whittall*. I grant that all which the subscribing witness appears on the face of the instrument to have attested, must be taken to have been *rité actum*. But what is so attested in this

(a) The Lord Chief Baron was sitting in equity when this case was disposed of.

(b) 1 M. & M. 286.

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case? — only that a person named *Francis Musgrave* signed the note. That does not make out that the defendant is that person. The question to be tried is not merely whether the signing the instrument was attested by the subscribing witness, but also whether the party sought to be charged is the party who signed it, as so attested. I see no ground here for answering the latter proposition in the affirmative. I am of opinion, therefore, that this rule must be discharged. I see no reason for the distinction said to have been made by the Vice Chancellor *Leach* in *Hill v. Unett* and *Loxley v. Hill* (a), where it is laid down, that if a subscribing witness is dead, it is only necessary to prove his handwriting; but that when alive he must not only prove his own handwriting as witness, but also that of the person who executed the deed. If the latter position were true, the witness, if alive, must be produced, or examined by interrogatories at a great expense, though resident out of the jurisdiction. It was appositely observed by Mr. *Addison*, that the identity of the parties appearing from the register to have been married is always, in an action for adultery, required to be proved, as also that the statement in an indictment that the prisoner has been previously convicted, is always supported by proof of his identity.

BOLLAND B.— I perfectly agree with my brothers that it was incumbent on the plaintiff to give some evidence that the party sued on the note was identical with the party signing it. Eminent judges have differed on this point, but Lord *Kenyon's* opinion on it, as expressed in *Wallis v. Delancey*, was similar to ours; and in *Nelson v. Whittall* Lord *Ellenborough* did not take on himself to say that the question was not

(a) 3 Madd. R. 370.

open for discussion. It is true that Lord *Tenterden* invariably acted otherwise, and that C. J. *Best* acceded to that practice. The earlier cases cited in the able arguments of Mr. *Milner* do not appear to me to touch the point, because in most of them the defendant appeared by counsel, and the struggle was not whether evidence was necessary to prove that the person sought to be charged was the person who signed, but whether the instrument could be read at all in the absence of the subscribing witness; and if it could, what other evidence of it is necessary. But Lord *Kenyon* distinctly held, in *Wallis v. Delancey*, that in the absence of the subscribing witness it was necessary not only to prove his handwriting, but that of the party sued, as having executed the bond; the latter circumstance being one mode of proof to connect the person executing with the party sued. My opinion on this subject not having been shaken by what I have heard, I think this rule ought to be discharged.

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GURNEY B.—I have often had occasion to consider this subject, and have never seen occasion to alter the opinion I had formed, that some evidence must be given of the identity of the party sued and the party signing, in addition to that of the subscribing witness's handwriting.

The Court ordered a nonsuit to be entered, instead of a verdict for the defendant, and the plaintiff afterwards recovered on proving the identity of the defendant with the *Francis Musgrave* who signed the note (a).

(a) *LOGAN v. ALLDER*. — Cor. Bolland B. Guildhall sittings, after Michaelmas 1832. Debt on bond, describing the defendant of *H. House* in the county of *Durham*. The subscribing witness proved that he had seen party sued thereon, where the subscribing witness proves that he never saw before or after he saw it executed. Evidence must be given of identity of the obligor of a bond with the defendant.

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the defendant execute the bond at an inn at *Bognor* in *Sussex*. On cross-examination he stated that he was a waiter at the inn at the time, and had never before or since the execution seen the person who then signed the bond, and was not aware that the defendant was that person, or that he lived at *H. House, Durham*. It was objected for the defendant that the defendant's identity was not shown. For the plaintiff it was answered, that as it appeared from the bond that the obligor's name is the same as that on the record, the presumption that he is the same man arises and must prevail, till rebutted by the defendant's proof that he was not *W. R. Alder of H. House*. The plaintiff was nonsuited.

In *Hilary* term *W. H. Watson* moved to set aside the nonsuit. In *Hensell v. Lyon* (a) an answer in chancery, purporting to be by a person of the same name as the defendant, to a bill filed against him in the same character of administrator in which he was sued in the action, was on the face of it presumptive evidence of his identity, he not having shown any circumstances to rebut it. In that case Lord *Ellenborough* says, "The question then is, whether public convenience requires that the proof should be given by the plaintiff or the defendant, and I rather think that public convenience is in favour of the admissibility of this proof, giving the other party an opportunity of showing that he was not the individual named in the answer. It should be taken as proof that he is the person named in the answer, until the contrary is shown. I do not say that it is conclusive, but that it is *prima facie* evidence. [*Bayley* B. That case turned on the inconvenience of removing public records. The question of identity was secondary only. There is no suggestion that this plaintiff was surprised, and you might have proved the obligor's handwriting (b)]. That would not prove the identity of the obligor and the defendant. A writing thirty years old proves itself, without proving identity of the parties. [*Bayley* B. Handwriting only is there presumed, not identity. *Bolland* B. The rule of law is the same in civil as in criminal proceedings (c). Now suppose a person to be tried for forging the signature of *W. R. Alder of H. House* to a bond, and that the subscribing witness said, "I saw that bond signed at the inn I keep, but I never saw the party executing before or since," could that prisoner's case be left to the jury?] The case of the prisoner is scarcely analogous, for he is at the bar, and the witness must identify the prisoner to convict him; whereas the defendant is not in court.

The Court refused to grant a rule, but staid the *postea* in the hands of the officer till the then pending case of *Whitelock v. Musgrave* should be disposed of. They afterwards granted a rule nisi for a new trial on an affidavit of surprise, and the parties compromised.

(a) 1 B. & Ald. 182. (b) And see 1 Phillipps, 7 ed. 475; 2 id. 10.

(c) And see per Lord *Ellenborough*, 1 B. & Ald. 185.

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ISAACS *against* GOODMAN.

THOMAS moved for judgment as in case of non-suit. The issue was joined in this term, and notice of trial was given for the second sitting in it, but countermanded in time. He contended that the joining issue was a step taken in this term.

Gurney B. refused the application, and afterwards,

Per Curiam, after consulting the master, who read the *Reg. Gen. Easter*, 5 G. 4. [Vol. I. App. p. xii.] This motion is premature. The plaintiff was not bound to take more than one step in a term.

proceed to trial. [See *Reg. Gen. Easter*, 5 G. 4. Vol. I. App. xii.]

Issue was joined in a town cause in the term, and notice of trial was given for a sitting in it, but countermanded. It is premature to move in the same term for judgment as case of non-suit, on affidavit that the plaintiff had given notice of trial, and neglected to

TREW *against* BURTON.

BY a baron's order all matters in difference in this cause between the parties were referred to the award of *W. C.* and *Francis S.*, with power to choose an umpire before proceeding on the reference. An umpire was accordingly appointed, who being ultimately called on to act, awarded the said cause in

misdescribing the Christian name of one of them: Held, that as in an action on the award the recital of the appointment of the umpire would be unnecessary, the award remained in force, and an attachment lay to enforce it.

The affidavit of publication of an award should show in the body that the day on which it was so published was within the time limited for making the award; but it is sufficient if the jurat show that it was sworn before that time had run out.

If a stranger alter an immaterial part of an award after it is published, by striking out a wrong, and inserting a right name, the award is not vitiated, and stands as before the alteration was made.

Arbitrators having power to appoint an umpire, nominated one accordingly, who made his award, reciting his nomination by them, but

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favour of the plaintiff, and that the sum of 184*l.* was due from defendant to plaintiff, and that defendant should pay the same to plaintiff, or his attorney, on demand, with costs to be taxed by the master, and that the said cause be not further proceeded in, and that the parties should bear the costs of the reference in equal proportions, and that plaintiff should pay the costs of the award, and that defendant should repay the plaintiff one moiety on demand. The award recited the judge's order of reference as being to *W. C.* and *Thomas S.* instead of *Francis S.*, with power to the said arbitrators to appoint an umpire. The award, after being executed and published by the umpire, and after the delivery of the original to him, and of a copy to the defendant's attorney, was corrected as to this mistake by the plaintiff's attorney, who erased *Thomas* and inserted *Francis*, and gave notice of having so done to the defendant's attorney. The umpire had previously offered to republish his award.

In *Hilary* term *Platt* obtained a rule to set aside the award, on the ground that it purported to be made by an umpire chosen by persons to whom the judge's order did not give power of such choice, and also on the ground of its having been altered since its publication. *Humfrey* had obtained a rule for an attachment for not performing it.

Both rules were enlarged to this term.

Humfrey being stopped by the Court, *Platt* objected to the rule for the attachment, on the ground that the date of the execution of the award by the umpire was not stated in the affidavit of that execution on which the rule was framed, so that it did not appear that the award was executed on or before 20th *Jan.*, the day limited for that purpose (a). But after inspecting the affidavit of execution,

(a) *Harvey v. Harvey*, K. B. H. 4 & 5 G. 4. MS.; and see *Wohlenberg v. Lageman*, 6 Taunt. 251; 2 Marsh 580, S. C.

Bayley B. said the jurat of this affidavit shows that it was sworn before the time for making the umpirage had elapsed. It therefore sufficiently appears that the award was executed in due time, and this difficulty is superseded.

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Platt continued. The umpire adjudicates under an authority which appears to be derived from persons, to one of whom no authority was given by the judge's order. If the arbitrator's name be not material, it would be equally unnecessary to state correctly the name of the judge by whom the order was granted. At all events, the alteration of the name of a person from whom the umpire derived authority, vitiates the award.

BAYLEY B.—I am of opinion that the rule for this attachment ought to be made absolute, and that the rule for setting aside the award should be discharged. The cause was referred to *W. C.* and *Francis S.* with a direction that before proceeding on the arbitration they should nominate an umpire to decide in case of their differing; and it is ascertained that *W. C.* and *Francis S.* did, in point of fact, duly nominate as umpire the person who ultimately made the award. His nomination then was regular, so as to clothe him with all the powers necessary to authorize him to act. He acted accordingly, and made his umpirage; but in so making it he has misdescribed, in his recital, *W. C.* and *Thomas S.* to be the original referees, adding, that they nominated him as umpire. There was no reference to *W. C.* and *Thomas S.*, nor did those persons ever delegate any authority, as umpire, to the person who made the award, but *W. C.* and *Francis S.* did, and the umpire proceeded and made his award accordingly.

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But there is no doubt that he might have made a valid award without reciting how he was appointed umpire. He might have prefaced it by merely stating, "I —, of —, do make my award and umpirage," and then have proceeded to make his directions. Nor in an action on such an award need any recital of his appointment as umpire be stated in the declaration, and it would be sufficient to state that the matters in difference were referred to *W. C.* and *Francis S.*, with power to nominate an umpire, and that they nominated the umpire accordingly, who made his umpirage. The mistake in the recital then would not justify us in setting aside the award. And though the alteration which has been made in the award is said to have vitiated it, and would have assuredly done so, had it been made in a material part, I am of opinion that this alteration by a stranger in a part which I hold to be immaterial, leaves the umpirage as before it took place (a).

As to the affidavit of publication of the award used in support of the attachment, it is certainly defective, in not stating on what day the award was published, and if there was nothing else to show the court that it was not executed before the day when the power to make the award had expired, the attachment could not have been granted; but as it turns out, on inspecting the jurat, that the affidavit was signed before that day, that fact shows that the award was executed within the proper time. That is sufficient; and I am, therefore, of opinion that the rule for the attachment should be made absolute, and the rule for setting aside the award should be discharged.

VAUGHAN B.—I do not consider the recital which

(a) See *Henfree v. Bromley*, 6 East, 309; *Irvine v. Elton*, 8 East, 54; *Hall v. Alderson and Another*, 2 Bing. 476.

has been made by the umpire to be of the essence of the award which he has made. That award might have been so framed as to be good without any recital at all, and if so, it may be dispensed with altogether.

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BOLLAND B.—I agree with my learned brothers in considering the recital immaterial, and therefore concur in making the rule absolute for enforcing the award; though during the arguments I entertained considerable doubt whether, as the umpire was a stranger to the parties, and had no authority till appointed by the referees, the mistake in the recital of that appointment, which he had taken on himself to make, would not vitiate the award.

GURNEY B.—The reference to *W. C.* and *Francis S.* was good; so was the appointment of the umpire which was made by *W. C.* and *Francis S.* Then the umpirage or award followed the power, but its recital of the umpire's appointment mistook the Christian name of one of the original referees. Now in a declaration on the award, that recital might be omitted as immaterial, and only the fact of the umpire's appointment need be averred. If so, the mistake will not vitiate the award or prevent the remedy upon it by attachment.

Rule for setting aside the award discharged.

Rule absolute for the attachment, without costs.

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LUCAS *against* JENNER.

When after general issue and plene administravit pleaded, defendant moved for judgment as in case of nonsuit, the court discharged the rule on a peremptory undertaking to try the first issue only, allowing the plaintiff to take judgment *quando acciderint* on the second.

THE defendant pleaded the general issue and plene administravit. A rule was granted for judgment as in case of a nonsuit. The rule was discharged on giving a peremptory undertaking to try the issue joined on the first plea, the defendant being at liberty to take out a summons to withdraw his replication to the second plea and take judgment of assets *quando acciderint*.

BURT and Others (Assignees of DAWSON and KERR, Bankrupts) *against* MOULT.

D. and *K.* being partners, *K.*, the day after committing an act of bankruptcy, handed over a post bill and money to *M.* as agent for his brother, the drawer of a bill accepted by the firm and becoming due in a few days, by way of fraudulent preference of the drawer, and in contemplation of bankruptcy.

TROVER by the plaintiffs as assignees against the defendants to recover a bank post bill for 200*l.* and 10*s.* in money. The first count of the declaration was upon a possession and conversion before the bankruptcy. The second count alleged a possession before and a conversion after the bankruptcy, and the third was upon the possession of the plaintiffs as assignees. At the *Lancaster* summer assizes, 1832, a verdict was found for the plaintiffs for 200*l.* 10*s.* subject to the opinion of this court on the following case.

The bankrupts *Dawson* and *Kerr* carried on business in partnership at *Manchester* as nankeen manufacturers, for several years prior to their bankruptcy.

Afterwards, and on the same day, *D.* also committed an act of bankruptcy. It did not appear that *D.* while solvent knew of the act of *K.* in handing over the post bill and money. A commission was afterwards issued against both *D.* and *K.* Held, that their assignees could recover from *M.* the amount of the property handed over to him by *K.* after his act of bankruptcy.

They had a servant named *Newman*, who resided permanently in *London*, upon whom they were in the habit of drawing bills and of afterwards remitting money to him for the purpose of providing for and paying the same. For several months previously to their bankruptcy, *Dawson* and *Kerr*, who were then in insolvent circumstances, found the greatest difficulty in providing for the bills drawn by them upon *Newman* as aforesaid, and were obliged to borrow bills and money from their friends in *Manchester* to enable them to do so. In *July* 1831, many of those bills accepted by *Newman*, amounting to 1365*l.* were returned to the indorsers in *Manchester* dishonoured; one as early as the 13th or 14th of that month, and others on the 27th, 28th, and 29th of the same month, none of which were paid or taken up by the bankrupts excepting one bill for 70*l.* which had been returned unpaid on the 13th or 14th as aforesaid. On the 1st *August* 1831, and on other days during that month, twelve bills drawn by *Dawson* and *Kerr* upon and accepted by *Newman*, amounting to 937*l.*, were returned dishonoured, none of which were afterwards taken up or paid by *Dawson* or *Kerr*; there were also thirteen bills amounting to 1939*l.* due in *September*, and seventeen other bills amounting to 1792*l.* due in *October* in the year aforesaid, all drawn by *Dawson* and *Kerr* on and accepted by *Newman* then remaining, and which they had no means or likelihood of paying, and none of which were in fact afterwards paid either by *Newman* or *Dawson* and *Kerr*. *Kerr* committed an act of bankruptcy on the 29th *July* 1831, after which day no bills were paid by the bankrupts. *Dawson* committed an act of bankruptcy at 10 o'clock in the night of the 1st *August* 1831. About two months previously to this, *Dawson* and *Kerr* accepted a bill for 200*l.* drawn by *William Moulton* of *Philadelphia*, brother to

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the defendant, and for whom the defendant was agent in this country; this bill was accepted for value and would become due and payable on the 3d *August* 1831. On the morning of the 1st *August* 1831, *Kerr* (one of the bankrupts,) who was on terms of intimate private acquaintance with the defendant, gave to the defendant as agent for his brother in *Philadelphia*, by way of fraudulent preference of his said brother, and in contemplation of bankruptcy, a post bill of the Bank of *England* for 200*l.* and 10*s.*, the joint property of the bankrupts; and before two of the clock on the same day the defendant paid the said bank post bill into the bank of Messrs. *Scholes, Tetlowe & Co.* of *Manchester*, to provide for the said bill which was payable in *London*, telling those bankers that he brought the money to take up the bill for the honour of his brother, to prevent its going back to *America*, but did not say why the same would be returned, nor did he make any mention of *Dawson* or *Kerr*. According to the nature of this transaction, the bankers were not bound to apply the specific bank post bill received by them from the defendant to the payment of the said bill on *Dawson* and *Kerr*, but it became the property of the bankers when delivered to them, and they thereupon entered into a contract with the defendant to pay the bill in *London* in such way as they might think fit.

On the day following, namely, the 2d *August*, the bankrupts being arrested at the suit of one of their creditors, the defendant became bail for them.

The question for the opinion of this court is, whether, under the above circumstances, the plaintiffs are entitled to recover from the defendant the value of the bank post bill and the 10*s.*? If the court are of opinion in the affirmative, then a verdict to be entered for the plaintiffs for 200*l.* 10*s.*, if in the negative, then a nonsuit to be entered.

The points marked for argument were as follows :—

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*For the Plaintiffs.*—That the conversion in this case was by the payment of the post bill &c. to *Scholes & Co.* as agents for defendant, and having taken place after acts of bankruptcy by both bankrupts, the plaintiffs were entitled to recover. Supposing the court should be of opinion that the payment of the post bill &c. in question to *Scholes & Co.* was a conversion, and which was before an act of bankruptcy by one of the bankrupts, though after an act of bankruptcy by the other, still that the defendant is liable in trover. Because the appropriation of the bank notes to the payment of the bankrupts' acceptance being a fraudulent preference, was void, and then the transaction in law amounted to nothing more than a mere bailment, in which case the plaintiffs as assignees could maintain this action, whether the conversion were before or after the bankruptcy of the bankrupts. If this were otherwise, then all that would be necessary to secure a creditor who obtains goods from his debtor by way of fraudulent preference, and in contemplation of bankruptcy, would be to convert them into money before his debtor commits an act of bankruptcy.

*For the Defendant.*—That the action is not maintainable because only one of the bankrupts had committed an act of bankruptcy at the time the post bill and 10s. were delivered to the defendant, and because the defendant was a mere agent to carry them to the bank at *Manchester*.

The Court stopped *Archbold* for the plaintiffs, calling on

*Wightman* for the defendant.—The question is,

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whether the whole interest in the sum sought to be recovered was in the plaintiffs as assignees at the time of the conversion? The delivery to the defendant on 1 *August* 1831, was good as against the then solvent partner *Dawson* and his assignees, he as well as *Kerr* being bound to provide for their acceptance. [Lord *Lyndhurst* C. B. How can that be so, when the case finds as a fact that the post bill and money were given to the defendant by way of fraudulent preference? *Kerr* was not at that time a solvent partner. *Bayley* B. *Kerr* had no power to dispose of partnership property at the time he did, for he had then himself committed an act of bankruptcy.] Suppose *Dawson* had never committed an act of bankruptcy at all, he would have been bound to pay the bill on the 3d *August*; then this payment of that bill by delivery of the post bill and money is good as against him. [Lord *Lyndhurst* C. B. During the earlier part of *July*, bills to the amount of 1365*l.* had been returned to the bankrupts dishonoured; only one was afterwards taken up. The firm then was in great distress before *Kerr* committed the act of bankruptcy on the 29th.] Still as if *Dawson* had never become bankrupt this action would not have lain, so as he did not commit any act of bankruptcy till after the conversion here relied on, the same consequence follows. The delivery of the bill and money to the defendant by *Kerr*, though made without *Dawson*'s privity, would have been valid against him had he continued a solvent partner; if so, and there is no evidence that he dissented from it, the assignees cannot maintain this action, *Smith v. Oriel* (a).

LORD LYNTHURST C. B.—You say that *Kerr*'s act would have bound *Dawson*, though contestible by him had he chosen. Now the assignees represent him,

(a) 1 East, 368.

and do contest the property of the defendant in this money under *Kerr's* delivery of it at a time when he as a partner had committed an act of bankruptcy, and so ceased to have any right to dispose of partnership funds except *bonâ fide*. But the transfer by *Kerr* is found to have been by way of fraudulent preference and in contemplation of bankruptcy. It was therefore a nullity, and could not pass the property, though the other partner *Dawson* might not have known it to have taken place, or might not have dissented before he also became bankrupt. But *Thomason v. Frere* (a) governs this case; for there were here two partners, one of whom having committed an act of bankruptcy is found to have handed over part of the joint funds to a third person by way of fraudulent preference. The other partner, whether *conusant* or not of the transaction, never ratified it; and, on his bankruptcy a short time after, his assignees contested the act of *Kerr*. The case therefore ranges itself entirely within *Thomason v. Frere*, which decided that a partner after committing an act of bankruptcy cannot do any act to bind the property of his solvent partner or of his assignees.

BAYLEY B.—I take the long-established rule, as recognized in *Thomason v. Frere* (b), to be, that where one partner commits an act of bankruptcy which is afterwards followed up by a commission and assignment, he has no longer any power over the partnership property, and any disposition of it by him is void as against the other partners, it having vested in them and his assignees by relation to his act of bankruptcy.

(a) 10 East, 418.

(b) See *Hague v. Rolleston*, 4 Burr. 2174; 12 Mod. 446; Cowp. 446.

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All the necessary requisites have here concurred to disqualify *Kerr*. His act of bankruptcy put an end to that agency for *Dawson*, with which, up to that time, he must be taken to have been invested by the relation of partnership which existed between them. On that event, the power to bind *Dawson* as his agent ended, and the property in the partnership funds vested at once by operation of law in him jointly with the assignees of *Kerr*. Then the assignees of *Dawson* might sue in order to repudiate the acts of *Kerr*. Here *Dawson* was entitled to choose whether he would pay particular creditors or not; no stranger could interfere to prevent him from paying any given creditor. *Kerr*, after his bankruptcy, was that stranger; for though *Dawson* while solvent possessed the power I have stated, notwithstanding *Kerr's* act of bankruptcy, that event was a dissolution of partnership, and stripped *Kerr* of any power to dispose of the joint funds. It did not appear that *Dawson* concurred in the delivery here contested, or that he even knew of it. Had he, while solvent, ratified the act of *Kerr* by any subsequent assent, the case would have had a different aspect. As it stands, that act was a wrongful bailment by *Kerr* of the property in question, and the assignees of both partners may insist that it is their property under the commission. They are therefore entitled to recover.

VAUGHAN B.—I was of counsel in *Thomason v. Frere*, which is an unexceptionable authority to prove that no property passed by the act of *Kerr* after the act of bankruptcy by him committed. The most favourable point of view for the defendant is, that *Kerr's* act was done without the knowledge of *Dawson*, whose actual dissent did not appear. But no act of ratification by him appears, and his assignees repudiate it by bringing this action. There is some ambiguity in

the statement of the case, that the act was done by *Kerr* by way of fraudulent preference, and in contemplation of bankruptcy; those terms, taken with the fact of the existing pressure on the firm, seem to apply more to the bankruptcy of *Dawson* than to that of *Kerr*, which had been rendered certain by his previous act of bankruptcy.

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BOLLAND B.—*Dawson* does not appear to have been originally privy to the act of *Kerr*, or to have afterwards assented to it, while by solvency he remained competent to do so. Then that act did not transfer the property to the defendant.

Judgment for the plaintiffs.

**M'CURDY against DRISCOLL and Others.**

**TRESPASS.** Six counts alleging six distinct assaults and batteries, and four distinct imprisonments. The general issue and seven special pleas were pleaded; each of which was applied to the whole declaration, and after reciting the specific acts of trespass laid in the first and every other count successively, proceeded to justify each act so laid under a *ca. sa.* issued from the palace court, concluding thus, "which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the plaintiff

Where several acts of assault and imprisonment are alleged in separate counts, the circumstances relied on as justifying them must be directed to each different occasion on which the defendant is charged with a trespass; and

it is not sufficient to confess in each plea the several acts of trespass laid in every count, if the defendant only seeks to avoid them by stating one cause for the whole, even though that cause be continuing, and the pleas do not state the trespasses in the first and other counts to be the same and not other or different.

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hath above thereof complained, &c." (a) The sixth special plea was chiefly relied on for the defendant, and was pleaded to every act of assaulting, &c. &c. in the declaration. It stated the delivery of the ca. sa. to the defendant *D.*, who afterwards, and before the return of the said writ, to wit, on the day and year in the declaration mentioned, being the said time when &c. and within the jurisdiction &c. took and arrested the said plaintiff by his body, whereupon the plaintiff forcibly resisted and opposed the due and lawful execution of the said writ, whereupon the defendant *D.* and the other defendants as his assistants, in order to overcome the plaintiff's forcible resistance and opposition, and because they could not otherwise overcome it or keep plaintiff in a safe and proper manner, necessarily and unavoidably a little pulled about &c. and imprisoned plaintiff for a reasonable and necessary space of time, which are the said supposed trespasses in the introductory part &c. (as before). Special demurrer to all the special pleas alleged, among other causes, that the plaintiff having alleged several causes of action, the defendant assumed to answer all, but only answered one; and that the special pleas in effect aver that the assaults shown by the plaintiff to be different are one and the same, done at one and the same time.

*Platt* for the demurrer cited *Edmonds v. Walter and Others* (b).

The Court then called on

*Byles* to support the pleas. If a plea which assumes

(a) It was not added that the assaults &c. in the said counts were one and the same, and not other or different.

(b) 2 Chit. R. 291.



to answer the whole declaration answers in fact only part, or if, as in *Edmonds v. Walter*, it alleges causes of action laid in the declaration as several and distinct causes, to be one and the same, it is bad, though commonly practised, to avoid the expense of pleading severally to each count (a). For a plaintiff might otherwise be obliged to abandon all but one cause of action, and to take issue on one immaterial point. But these pleas, particularly the sixth, confess and admit the distinct trespasses, and allege a continuing cause rendering it necessary to do sufficient to justify them all, viz. the plaintiff's opposition to the execution of process, which must be taken to have been continuing co-extensively in duration of time and in alteration of place with the different trespasses laid. If the continuing cause was to be objected to as being laid argumentatively it should have been specially demurred to for that cause; *Petchet v. Woolston* (b). The court will give a meaning to "being the said time when &c." by supplying the words for which that "&c." is substituted, and construing them distributively, viz. that at each time when each assault &c. is respectively laid to have been committed the plaintiff forcibly opposed; nor would the plea be therefore double, for it amounts to but one answer to the whole declaration, though containing different answers to different parts of it respectively.

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Lord **LYNDHURST C. B.**—There does not appear from any plea to have been more than one cause for all the trespasses complained of, nor is more than one assault &c. justified in each plea. The whole seems to be one transaction.

BAYLEY B.—The declaration alleges six several

(a) *Taylor v. Herbert*, Freem. 367, pl. 472; 1 Chitt. on Pl. 472, 4th edit.

(b) *Aleyn*, 48; Com. Dig. Pleader (E. 3.)

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assaults and four several imprisonments. The pleas confess six assaults and imprisonments, but you do not state them to be different, nor do you avoid them. But the justifications should have covered the whole trespasses alleged. No reason is given for assaulting the plaintiff six times or imprisoning him four times. The defendant should have stated circumstances to show his right to assault the plaintiff on the first occasion, and to imprison him on that occasion, and then should have stated other circumstances to show that he had a right to assault him and imprison him the second time; and so on as to each assault or imprisonment laid. But no different occasions are shown.

The other Barons concurred.

Judgment for plaintiff (a).

(a) No plaintiff who alleges on the record a matter to be other and different which is in fact one and the same, *e. g.* who states in a new assignment that the locus in quo is *alius quam in barrâ* (of *liberum tenementum*), can have any advantage thereby. In the instance put, the defendant should plead not guilty to the new assignment. But any plea by him that what the plaintiff alleges on record to be other, is one and the same, will be bad on demurrer or in error. See *Freestone v. Stanford*, Cro. Eliz. 355, 492; Vin. Ab. tit. Trespass (U 4^a) pl. 9; also 2 Saund. 299, c, and 300; *Aikenhead v. Blades*, 6 Taunt. 198; 1 Marsh. 17, S. C. The case of *Sheldon v. Clipshaw*, Sir T. Jones, 158. Sir T. Ray. 448, seems in favour of the plea in the principal case.

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CORNISH *against* KING.

ON 3d *May*, *Ball* moved for a rule for the plaintiff to be at liberty to enter an appearance for the defendant, and proceed thereon to judgment and execution, pursuant to 2 *W. 4. c. 39. s. 3 (a)*.

BAYLEY B.—As the place of the defendant's resi-

(a) The affidavit of a sheriff's officer stated, that a writ of *distringas* having issued against the defendant on 26 *January*, under a rule of court, a warrant was granted by the sheriff to the deponent, who in pursuance thereof attended several times at the lodgings of the defendant, situate at &c. for the purpose of executing the warrant; that defendant was on all such occasions denied to the deponent, who on 13 *April*, the return day of the *distringas*, finding it impossible to execute the warrant, left with the person who keeps the house in which are the defendant's lodgings, a copy of the *distringas* and notice thereto annexed, requiring the defendant's appearance within eight days inclusive after its return; and that deponent was unable to distrain for the 40s. according to the tenor of the said writ, the lodgings of the defendant being ready furnished, and the woman of the house informing deponent that the defendant had nothing there on which he could so distrain.

The follower's affidavit stated his belief that the copy of the *distringas* so left as aforesaid reached the defendant, the landlady having stated to the deponent that all papers left for the defendant had been forwarded to him; but declined to say where he was: That deponent believed defendant to be well aware of the proceedings in the cause, and to keep out of the way to avoid them: That the sheriff of *Middlesex* had been ruled to return the said *distringas*, and had returned *non est inventus* and *nulla bona*: That deponent searched the appearance book in the *Exchequer* office, on the 29 *April*, and that defendant has not entered any appearance to the said writ of *distringas*: That since the issuing said writ an offer has been made to plaintiff to pay him 5s. in the pound in full of his debt in question: That a clerk to an attorney obtained copies of the writ of summons and *distringas* from the plaintiff's attorney, but would not sign any undertaking to appear. Both deponents swore that all proper means were used to serve and execute the *distringas* and warrant.

Where a *distringas* is returned *non est inventus* and *nulla bona*, and defendant's residence is a furnished lodging, attempts to execute the warrant should be made, the copy of the *distringas* and warrant issued thereon should be left at the lodgings, and an affidavit made stating the facts, and also that inquiries have been made, whether the defendant had goods elsewhere. If none can be discovered, the plaintiff will be suffered to enter an appearance for defendant and proceed to judgment and execution under 2 *W. 4. c. 39. s. 3*.

It cannot be made part of the above rule, that service of notice of declaration

at the defendant's last known place of residence and sticking up a declaration in the office be deemed good service.

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dence is a furnished lodging, it should be sworn that the plaintiff had made fruitless inquiries after any goods which the defendant might have had elsewhere.

That affidavit having been supplied, the rule was granted as above; but,

Per Curiam.—The latter part praying that leaving notice of declaration at the last place of the defendant's abode and affixing declaration in the exchequer office, should be deemed good service of declaration, must be the subject of a separate motion (a).

(a) See *Reg. Gen. Hil.* 1832. No. 49. Vol. II. 349.

JONES *against* CLIFFE.

The plaintiff pawned a watch, and afterwards gave defendant the duplicate to get it out of pledge. Defendant took it out accordingly on paying the advance and interest. Plaintiff's agent claimed that watch from defendant, saying, plaintiff would of course pay what had been advanced to redeem it.

The defendant

said he had not got the watch, and would not tell who had. Held, that that was evidence of a conversion to sustain a verdict for the plaintiff in trover, and that the plaintiff was not bound to tender the defendant the sum paid on account of the watch, as the defendant had not got it ready to deliver to him in return.

TROVER for a watch, tried before *Taunton J.* at the last *Salop* assizes. In *September* 1828, the plaintiff had pawned a watch worth 20*l.* for 10*l.* 10*s.* In *July* 1829, the plaintiff, a clerk, entrusted the defendant, his former master, with the duplicate, in order to regain the watch, which he did on paying 1*l.* 17*s.* The terms on which the duplicate was delivered by the plaintiff to the defendant did not clearly appear. There appeared to be unsettled accounts between them at the time. On 9 *November* 1832, the watch was demanded of the defendant, who said he had had it once in his possession, but had not got it then; but that the plaintiff might have had it if he the defendant had had it in *Liverpool*, when the plaintiff was in his service. He said that he had had the duplicate from

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the plaintiff to redeem it. The defendant was then told that the plaintiff would allow him on account whatever sum he had paid to get the watch back, but no tender was made of any sum. He spoke of a deficiency in the plaintiff's accounts with him. The defendant refused to say who had the watch, and said that he had not redeemed it himself, but got a friend to redeem it, and advance the money. It was urged for the defendant, that as the plaintiff could not call for a return of the watch till the money paid for redeeming it was tendered, no conversion was or could be proved, and that plaintiff should be nonsuited. *Taunton J.* having overruled the objection, and refused leave to move for a nonsuit, a letter was put in for the defendant, addressed by the plaintiff to a person in the defendant's employ, containing these words: "before we can come to a settlement, will Mr. *Cliffe* give up my gold watch, on receiving whatever he has paid for redeeming it?" No answer appeared. The learned judge directed the jury that if the watch was taken out of pawn by the defendant at the request of the plaintiff, who said he would not pay for so doing, but that if the defendant would, he might keep the watch, the defendant was entitled to a verdict; but that if he was entrusted to get it out for the plaintiff, then the plaintiff was so entitled. He said at the time the watch was demanded, the defendant did not insist on having had the duplicate as part payment of any deficiency in the plaintiff's accounts. Verdict for the plaintiff for 10*l.*

Justice now moved for a new trial, on the ground of misdirection, and insisted on the objection taken at the trial.

LORD LYNTHURST C. B.—The evidence is, that the
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plaintiff pawned the watch. The defendant said he had it not in his possession, and would not tell to whom he had delivered it. Was it then necessary, under such circumstances, that a formal tender of the amount paid for redeeming the watch should be made by the plaintiff, when the defendant had not the article ready to deliver to him in return?

BAYLEY B.—The money was not tendered, but the defendant was told that it would be forthcoming if he would deliver up the watch. He says that he redeemed it, but that it is not in his possession, and will not tell who has it. Then, unless he was able to deliver it to the plaintiff, the latter was not, under the circumstances, bound to tender the amount paid for redeeming it.

Per Curiam,

Rule refused (a).

(a) As to waiver of the lien by refusal to deliver the watch on other grounds, see *Boardman v. Sill*, 1 Campb. 410 n. and *White v. Gainer*, 8 Bing. 25.

Cox, Assignee of the Sheriff of MIDDLESEX, *against*
TULLOCK.

Since 2 W. 4. c. 39. s. 11. if process is irregularly served early in a vacation, the defendant should apply to a judge at chambers, and not wait till the four first days of term.

ON 30 April a rule was obtained to set aside the service in *Middlesex* of process issued into *Surrey*, for irregularity, with costs. *Ball* showed for cause, that the process having been served early in the vacation after last term, the defendant might have gone before a judge at chambers without delay.—*Richards* contrâ. "Coming promptly" means, coming within the first four days of term.

BAYLEY B.—In the meantime the plaintiff may have delivered his declaration and signed judgment. We will see the other judges before we decide on a point affecting the practice of all the courts.

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On a subsequent day he said, The question here was, whether the defendant ought to have applied to a judge at chambers in the vacation to set aside irregular process, or might wait till term? We have seen the other judges, who agree with us in opinion, that he ought to have applied to a judge at chambers; and for this short reason, that since 2 W. 4. c. 39. s. 11. a plaintiff has a right to go on with his proceedings in vacation.

CANTELOW *against* FREEMAN.

ON 24 February the defendant was discharged from arrest on a *capias*, on undertaking forthwith to obtain A.'s acceptance for the debt and costs. Having failed to do so, he was again arrested on 9 April on a fresh writ, grounded on the same affidavit. A rule was obtained to discharge him out of custody, on the ground, first, that whether the second arrest was vexatious or not, the plaintiff was bound to obtain a judge's order before harrassing the defendant by the second arrest; and secondly, that it was in fact a discontinuance within *Reg. Gen. Hil. 2 W. 4. No. 7.* [Vol. II. 341.] It was shown for cause, first, that the condition on which the plaintiff agreed to discharge the defendant from arrest, not having been performed, the second arrest was not vexatious; *Puckford v. Maxwell(a)*; and secondly, that a judge's order was not

A defendant discharged from custody on mesne process, upon giving an undertaking, which was not performed, may be arrested a second time without a judge's order, under *Reg. Gen. Hil. 2 W. 4. No. 7.*

(a) 6 T. R. 52, and Anon. 1 Chit. R. 274, n.

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necessary in this case, which arose from the default of the defendant, and not from the plaintiff's laches, as in cases of non pros, nonsuit, or discontinuance.

Per Curiam.—The defendant was discharged out of custody on the faith of his representations that he could and would forthwith obtain a friend's acceptance for the debt and costs. Those representations were not verified by the event; nor does he assert any just ground for having made them. Then the plaintiff was justified in arresting him a second time; nor does the rule of court apply, for there has been no discontinuance; the *capias* issued on the affidavit originally filed.

Rule discharged with costs.

Archbold for, *W. H. Watson* against the rule.

The KING on the prosecution of PRIGG *against*
HOLDEN and CLOUGH.

Requisites for
moving for
relief against
forfeited re-
cognizances.

BIGGS ANDREWS moved to discharge a forfeited recognizance estreated into this court by order of a learned judge, on affidavits suggesting grounds for relief.

BAYLEY B.—You should have been also furnished with a constat of the proceedings from the office of the clerk of the estreats, to let us see what the recognizance is. The motion should have been made on either of those days in the week when the treasurer's remem-

brancer is present, and notice of motion should be given to him and to the solicitor of the treasury.

Motion refused (a).

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(a) See *Ex parte Dunk and Another*, ante, Vol. II. 500. The offices of the lord treasurer's remembrancer, as well as of the clerk of the estreats, being abolished by 3 & 4 W. 4. c. 99. s. 41. the records of those offices are by s. 45, transferred to that of the king's remembrancer, who by s. 46. is to perform all the duties of the abrogated officers, subject to the orders of the barons. By s. 47. copies and extracts of all the records so transferred are declared to be as available in evidence as before the offices were abolished.

GILMOUR *against* KING Gent. one &c.

SPECIAL assumpsit on the following contract of indemnity, to recover costs and expenses to which plaintiff had become liable in consequence of becoming assignee of certain bankrupts.

"Sir,

London, 23 October 1829.

In consideration of your having assented to become the assignee under a commission of bankruptcy against *C. E. Gadderer* and *J. C. Edwards*, at my express wish, and to oblige me, I hereby agree to hold you harmless and indemnified against all costs, charges and expenses to which you may become liable, in consequence of being such assignee. I am &c.

W. H. King."

The following were the facts. On 30 September 1829, a commission of bankrupt issued against *Gadderer* and *Edwards*. Defendant was petitioning creditor and solicitor to the commission. At the public meeting for the choice of assignees, debts to a large amount were proved; but no creditor being willing to become assignee, the plaintiff, a stranger to the estate,

Where creditors call on a stranger to a bankrupt's estate to be the assignee, and he having declared he will not be liable to costs, assents to their appointment, an agreement by the petitioning creditor, who was also solicitor to the commission, to indemnify him against costs, is not illegal.

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was solicited by them, as well as by the bankrupts, to take that office. He said he would not be liable to any loss. He afterwards took the above undertaking, and was appointed; actions were brought by the defendant in his name, and expenses were sustained to the amount sued for. At the trial before *Bolland B.* at the *London* sittings after *Hilary* term, *Hutchinson* objected that the agreement of indemnity being by the solicitor to the commission was illegal. Verdict for plaintiff. A rule having been obtained to enter a nonsuit,

John Williams and *Hoggins* showed cause. The necessity of appointing some assignee, made it necessary to induce some one, a stranger to the estate, to undertake the office when the creditors refused. The plaintiff did not obtrude himself into it, but several of the creditors at a public meeting requested him to take it on him. Then how is it impolitic or illegal that the solicitor to the commission should indemnify the assignee? In *Ex parte Steele (a)*, the solicitor chose himself assignee, and the commission was not superseded. Nor is this case like *Ex parte Wilson (b)*, where the solicitor guaranteed the petitioning creditor against the expenses of issuing a commission, and the creditor struck a docket accordingly; for the proceedings there originated with the solicitor; whereas the commission had issued in this case, and the creditors proposed and assented to the appointment of the plaintiff as a means of getting clear of their difficulties.

Hutchinson contra. The effect of this undertaking must be to prevent that examination of the bankrupt's affairs, which the policy of the law provides for the benefit of his creditors. For if the assignee takes an indemnity from the solicitor he transfers the real con-

(a) 16 Ves. 166.

(b) Buck's Bankruptcy Cases, 306.

trol over the estate and the solicitor to the latter, who thus in fact unites the office of assignee with his own. But those trusts are incompatible. Thus in the converse case of *Ex parte Badcock, in re Gundry* (a), where the assignee also acted as solicitor, Lord Chancellor *Lyndhurst* superseded the commission, expressing himself in the following manner: "I am of opinion that an assignee is not entitled to act as solicitor to the commission. It is part of the assignee's duty to direct and control the solicitor's proceedings, and if the offices be held by the same individual, that check must necessarily be lost. I think in reason or upon principle that the same person should not be permitted to fill two offices, one of which is in its nature responsible to the other." The language of Lord *Eldon*, in *Ex parte Wilson*, is not less strong. The distinction attempted between giving the guarantee before or after the commission issued is entitled to no weight; for all that was to be done for the benefit of this estate in getting in the debts, remained unperformed before the plaintiff was appointed assignee. In *Murray v. Reeves* (b), an agreement, by which, in consideration that the creditor of an insolvent would withdraw his opposition to his discharge, he was to become assignee to the estate and receive 100% out of it, was held void, as tending to withdraw the insolvent's case from that due sifting which he had submitted to, and which it is the interest of the public, as well as the creditors, it should receive. [Bayley B. You do not contend that the other creditors might not have indemnified the plaintiff, but only that a guarantee, if given by a solicitor who has to work the commission, is void. The undertaking in *Murray v. Reeves* was to withdraw the opposition which a creditor was about to make, and was held

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(a) *Montagu & Mac Arthur* R. 243.

(b) 8 B. & Cr. 421. See *Gillett v. Rippon*, R. & M. 406.

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fraudulent. It does not conclude this case.] The effect of this undertaking falls within the principle of that case. Had this guarantee been canvassed in equity *Ex parte Wilson* must have applied. The Chancellor in his discretion would have restrained the solicitor from becoming the assignee. [Bayley B. In that case the assignee was not a stranger, but agreed to be a petitioning creditor, and thus gave his aid to have a commission issued, which would not otherwise have been issued at all, on receiving indemnity from the solicitor, whose interest it was that it should issue. I do not see why the plaintiff should be taken to have put himself into the hands of a solicitor, because guaranteed by him against loss.] The assignee by this undertaking divests himself of all interest to restrain the number of suits to be brought by the solicitor.

BAYLEY B.—I am of opinion that this undertaking to indemnify the assignee is not illegal. He was a stranger to the estate, and at a time when none of the creditors at their public meeting are willing to come forward to take the office of assignee, he is requested by them to do so, and discharge its duties. Some one must be assignee; then why should it be expected that the plaintiff should gratuitously execute a duty, which, while it cast a burden on him, would, if honestly performed, confer on him no advantage? Indeed, in what manner can he be exonerated from actual loss, but by some undertaking of guarantee? On that account, therefore, he says publicly he will be at no loss, but, on receiving the indemnity from the defendant, consents to become assignee. It is said to be contrary to public policy that the indemnity should be given by the solicitor to the commission; but it does not follow that because the assignee is so indemnified he should place himself under the solicitor's control. He may take

indemnity from some one, and there seems no reason why the solicitor should not give it. Now in *Ex parte Wilson* the indemnity was given by the solicitor to a man interested in the estate, and bribed by him to act as petitioning creditor upon a debt, where without him the commission would never have issued. It was a bargain, that he, acting as such petitioning creditor, should give the solicitor the power of working the commission without himself incurring any responsibility as petitioning creditor. Here no agreement appears that the defendant was to continue solicitor to the estate. Then if he deviated from his duty as solicitor, the indemnity given by him to the plaintiff would not prevent the latter displacing him, if necessary; while the defendant's undertaking to indemnify the plaintiff would have remained in full force.

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v.
KING.

VAUGHAN B. concurred.—The conduct of the defendant in giving the guarantee does not afford sufficient ground for resisting the action.

BOLLAND B.—If the plaintiff's case rested on the bargain with the solicitor only, there would have been more ground for argument against it; but the plaintiff was applied to at a public meeting of creditors to become the assignee, and told them there, "If I am to be the assignee, I will not be liable for any loss." Then the transaction of giving the guarantee naturally flows from that declaration, and appears to me supportable at law.

GURNEY B.—What passed at the meeting of the creditors divested the transaction of any fraudulent character.

Rule discharged as to the nonsuit:

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ERLE *against* WYNNE.

In order to get costs under 43 G. 3. c. 46. s. 3. where the arrest is for more than the sum recovered, the defendant need not show malice, but want of "reasonable and probable cause."

A RULE for costs having been obtained under 43 G. 3. c. 46. s. 3. it was shown for cause, that the arrest for the larger sum was proved by the affidavits not to have been malicious.

Per Curiam.—Our decision is founded on the words of the act, "reasonable and probable cause." We think that the facts establish no such cause to have existed. The doctrine that malice must be shown, in order to support a rule for costs, where the arrest was for more than is recovered, is over-ruled; *Donlan v. Brett (a)*.

Rule absolute.

J. Jervis for, *Cottingham* against, the rule.

(a) 10 B. & Cr. 117; see *Linley v. Bates*, *ante*, Vol. II. p. 473.

COOK *against* ALLEN.

A sheriff seized goods under a fi. fa. before 14 Dec. On that day a baron at chambers stayed proceedings till the 4th day of Hilary term, to enable defendant to

ON the 14th December an application was made at chambers to set aside the judgment, with the execution and levy thereon, for irregularity; and the learned baron stayed the proceedings till the 4th day of the next term, in order to give time to move the court for that purpose. A rule was obtained accordingly, and discharged on 22 January [*ante* 378]. On move for a rule to set aside the judgment and execution for irregularity. It was obtained accordingly, and discharged on the 22d. On the last day of term, the 31st, the sheriff moved under the adverse claim act, 1 & 2 W. 4. c. 56., for protection against a claim by defendant's brother to the goods seized. Part of the goods had been sold and the rest removed. Held, that a sheriff must come promptly, and in this instance he came too late, in not moving within the four first days of Hilary term, or, at all events, sooner after the 22d, when the rule to set aside the judgment was discharged. *Semble*, that under 1 & 2 W. 4. c. 56. s. 1. the sheriff should also have denied collusion.

the 31st, the last day of *Hilary* term, a rule to show cause was granted under 1 & 2 W. 4. c. 56. calling on the adverse claimant to protect the sheriff of *Suffolk* against a claim of the defendant's brother, under a bill of sale, to the goods which had been seized under a *fi. fa.*

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For the claimant it was now urged, in discharge of the rule, 1st, That it might have been moved for early in *Hilary* term; or, at all events, after the rule for setting aside the judgment was discharged, and in time for showing cause in that term. 2dly, That the sheriff's affidavit only stated the *fi. fa.* seizure and claim by the third party, without denying collusion with him, as seems required by ss. 1. 2. and 6. of the act. The greater part of the goods seized were removed, and a small part was sold. [*Bayley* B. If the money has been paid over, the court will not interfere; *Chalon v. Anderson* (a).] A special bailiff was afterwards put into possession, so that the sheriff was discharged from the consequences of a false return; *Porter v. Viner* (b), *Pallister v. Pallister* (c).

For the execution creditor *Devereux v. John* (d) was cited to show that a sheriff will not be relieved, unless he comes in a reasonable time.

For the sheriff it was urged, that till the 22d, when the rule for setting aside the judgment was disposed of, it was useless to have moved, and that the interval between the 22d and 31st was not too long to get affidavits from the county. The affidavit is in the form hitherto used.

Per Curiam.—The intention of the statute was to protect sheriffs against the risk arising from conflicting claims on goods seized by them, but in order to that

(a) *Ante*, 237.

(b) 1 Chitt. R. 613, n.

(c) *Id.* 614, n.(d) K. B. *Hil.* 3 G. 4. *Parke* J. alone; 1 D. P. C. 548.

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benefit they must come promptly. In this case had not the rule to set aside the judgment been pending, the sheriff should have come within the first four days of the last term, and if his motion was deferred till after the former rule was disposed of, on the 22d, the interval between that day and the 31st is unaccounted for, during which the rule, if granted, might have been disposed of. The sheriff should have explained why he was not ready with the necessary affidavits on the 23d. *Bayley B.* added, It is by no means clear that he should not have denied collusion. Rule discharged (a).

S. Hughes for the sheriff, *J. Jervis* for the claimant, *W. H. Watson* for the execution creditor.

(a) See Tidd, 9 ed. 316.

GIBSON and Another, Assignees of a Bankrupt, *against*
HUMPHREY and Another.

Trover. Proceedings by assignees of a bankrupt against the sheriff for the value of goods of the bankrupt improperly sold by him under an execution, will not be stayed unless the plaintiffs agree as to the amount to be recovered.

TROVER for certain furniture and fixtures seized and sold by the defendants as sheriff of *Middlesex*. The seizure took place on 14th *Jan.* at the bankrupt's house, under a *fi. fa.* The sheriff received notice the same day that an act of bankruptcy had been committed by the then defendant before the seizure, upon which a fiat would be issued. It issued accordingly on 18th *January*, and the sheriff had notice of it; but sold all the property seized. The fixtures had been removed out of the house prior to its being sold, under a power of sale in a mortgage deed by the bankrupt to another person. The value of the house was said to have been much diminished by the absence of the fixtures. *Platt* had obtained a rule calling on the

plaintiffs to show cause why the proceedings in the action should not be stayed, on paying the assignees the produce of the furniture, and restoring the fixtures to their former place.

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W. H. Watson showed cause. The question is of value, and the plaintiffs will not consent to try it by affidavits or otherwise than by a jury; *Tucker v. Wright* (a). In *Brunsdon v. Austin* (b), where a part of a steam engine was surrendered to the plaintiff on payment of costs to that time, there was no dispute about the value. In *Pickering v. Truste* (c) the value was admitted. Here the assignees, after the removal of the fixtures, resolved not to redeem the mortgage and sell the house as they before intended. The assignees' damages are increased by the removal of the fixtures, and thus diminished the value of the house when sold by the mortgagee, so as to increase the balance, for she might prove against the estate. Nor will the court protect a sheriff who has sold after repeated notices to the contrary.

Platt contra. This is a vexatious claim *bonâ fide* resisted by the sheriff. If they could have applied for relief under 1 & 2 *W. 4. c. 58. s. 6.* as for a claim to goods, they would have been put to greater expense in taking possession. They cannot be made to pay more than the amount produced by the furniture and fixtures. It is the mortgagee who suffers by any diminution in the purchase money of the house.

LORD LYNTHURST C. B. — Though the courts will assist sheriffs who act fairly, we cannot prevent these plaintiffs from trying by a jury the amount of damage

(a) 3 Bing. 601; and see *Earle v. Holderness*, 4 Bing. 462.

(b) Tidd Pr. 545, 9 ed.

(c) 7 T. R. 53.

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which they allege themselves to have suffered from the sale of the fixtures in any particular manner. We cannot assume the province of a jury in estimating that damage (a).

BAYLEY B.—The parties here do not agree on the amount of damage incurred. Now in the cases in which proceedings in trover have been stayed on payment of costs, the specific chattel sued for has been delivered to and accepted by the plaintiff, without his disputing its quantity or quality, or making claim in respect of any special damage sustained by it. So if the chattel had been sold, and the amount to be recovered was undisputed, this motion might be granted; but here the plaintiffs do not consent to take back the fixtures and let the master assess the sum which the defendants ought to pay for reinstating them, but proceed for the value which they say they would have borne had they been sold while affixed to the bankrupt's house. Then the court cannot interfere. The sheriff and a private person are the same in this respect.

Per Curiam.—Rule discharged without costs.

(a) See 3 Burr. 1364; 2 Bla. R. 902; 3 Bing. 602.

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RUTTY *against* AUBER.

ARCHBOLD had obtained a rule for setting aside the judgment signed in this case, and all subsequent proceedings therein, for irregularity. The action was on a covenant for payment of money lent on mortgage, and the writ of summons was served on 9th *January*. On the 10th the defendant caused an appearance to be entered. The plaintiff's attorney having received no notice of appearance, searched the appearance book of *Hilary* term without finding the entry of appearance, and on the 21st entered a common appearance for the defendant. On the 26th he filed his declaration, and served the defendant with notice of declaration at his residence. On the 28th the defendant acknowledged the receipt of the notice. On the 4th *February* he signed judgment. On the 6th defendant's attorney told him that he had entered an appearance on the 10th *January*, and had received no declaration, demand of plea, or other notice. On the 9th the plaintiff's attorney obtained a summons to compute the principal and interest due, and got an order for that purpose on the 12th. The defendant's attorney then gave notice of motion to set aside the judgment for want of demand of a plea after appearance entered. On the 19th the execution was levied. On the 20th the defendant's attorney applied to a baron at chambers to set aside the judgment for irregularity; and by his order proceedings were stayed till the fourth day of this term, in order to enable a motion to be made for that purpose.

Follett showed cause.

after he committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed on the 26th *January*, the judgment must stand.

An appearance was entered for the defendant in due time on 10th *January*, but not being found in the appearance book on the search by the plaintiff's attorney, he entered a common appearance for him on the 21st, and proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. He signed judgment on 4th *February*, and levied execution thereon on the 19th. The defendant's attorney then said that he had entered an appearance for the defendant. Held, that though that entry of appearance made the demand of plea necessary, yet as the plaintiff's attorney was suffered to remain in ignorance of it,

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BAYLEY B.—This was an application to set aside a judgment for irregularity in having signed it without any demand of plea. An appearance was entered by the defendant on the 10th *January*; he was therefore entitled to a demand of plea, unless that step was dispensed with by any intermediate act. Now the notice of having filed the declaration which was delivered on the 26th *January* would have been irregular, if the plaintiff's attorney had known that an appearance had been entered by the defendant (a); but the defendant's attorney did not at that period inform the plaintiff's attorney of his irregularity in so proceeding, though he must have known him to be acting under a mistake, and the silence of the defendant's attorney justifies us in concluding that he knew the appearance had been entered on the 10th. He suffers the plaintiff's attorney to proceed in ignorance of the entry of an appearance, to file a declaration and sign judgment, without demanding a plea. Having thus justified him in taking that course, he cannot now take advantage of it.

VAUGHAN B.—Though a judge at chambers cannot set aside a judgment for irregularity, the practice is to take out a summons before him for that purpose, in order to procure his order for a stay of proceedings till the fourth day of the term inclusive, in order to afford time for moving the court for that purpose.

Rule discharged.

(a) Tidd, 9 ed. 456.

BROOKE and Another *against* COLEMAN.

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THE affidavit to hold to bail stated "that the defendant was justly and truly indebted to the plaintiffs as assignees of *A.* a bankrupt, in the sum of 51*l.* 9*s.*, upon and by virtue of a certain bill of exchange drawn by the said bankrupt antecedently to the fiat of bankruptcy issued against him, upon and accepted by the said defendant payable two months after date, and now remaining due and unpaid;" thus not stating the amount for which the bill was drawn, or the date, or to whom it was made payable. An order had been granted by a judge of C. P. for delivering up the bail-bond to be cancelled on entering a common appearance, unless this court should otherwise order. A rule having been obtained for setting aside the order,

An affidavit to hold to bail on a bill or note should state the amount for which it is drawn.

Seemle, that the allegation that the defendant was indebted to plaintiff in a sum stated will not aid an affidavit to hold to bail which is otherwise insufficient.


Kelly showed cause. The amount for which the bill was drawn should have been shown in the affidavit, the more so as it must be in the hands of the plaintiff who sues on it. In *Hanley v. Morgan* (a) this point was not judicially determined; and in *Lewis v. Gompertz* (b), the affidavit was held bad on another ground. Without such statement the arrest might often take place on a mere inference of law by the plaintiff. Now, a defendant can only be arrested for the principal due on a bill, unless interest be expressly made payable by half-yearly instalments, or on the face of the bill; the effect of which is, that it begins to run before the principal became due. [*Bolland* B. The refusal of a jury to give interest on a bill by way of damages in a case where the plaintiff had been guilty of laches in suing, was upheld in the King's Bench in *De Belloix v. Lord Waterpark* (c). *Bayley* B. In-

(a) 2 Cr. & J. 331.

(b) 2 Tyr. R. 317.

(c) 1 D. & R. 16.

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terest does not begin to run on a bill till dishonoured, after which time it may be recovered as damages, but if interest is reserved on the face of the bill, it runs from the date.] The allegation that the defendant is "indebted to the plaintiff in 51*l.* 9*s.*" cannot cure this defect, or it would have had a similar operation in other erroneous affidavits (a).

Erle contrà. . *Lewis v. Gompertz*, *Hanley v. Morgan*, *Lamb v. Edwards* (b), *Bradshaw v. Saddington* (c), *Lamb v. Newcomb* (d), *Warmsley v. Macey* (e), are cases in which the objection as to the amount might have been taken, when the affidavits were objected to on other grounds. The two first cases are against it. Here, as the bill is shown to be unpaid, the defendant is sufficiently shown to be *indebted* to the plaintiffs within C. J. *Dallas*'s reasoning in *Warmsley v. Macey*, and the plaintiffs may then draw the inference of *fact* that the amount of the debt so shown to be due is 51*l.* 9*s.* Suppose 20*l.* to have been paid on account of an over-due bill for 50*l.*, might not a plaintiff swear to a debt of 30*l.* on that bill? [*Vaughan B.* The affidavit does not state by whom the bill was drawn, or its date, nor to whom it was payable. If it was not drawn payable to the drawer or his own order, but to a stranger, the affidavit should have shown how the plaintiff became the holder, and who indorsed it to him; *Lewis v. Gompertz* (f).] The mere possibility of the plaintiffs being enabled to swear to an inference of law does not alter their positive oath that the defendant is indebted to them as assignees (g) in the sum of 51*l.* 9*s.*

(a) See per *Bayley J.* 2 M. & S. 149; also per *A. Park J.* 7 Bing. 252; 7 Taunt. 171.

(b) 2 Br. & B. 343.

(c) 7 East, 94.

(d) 2 B. & B. 343.

(e) *Id.* 338 (1820).

(f) 2 Tyr. R. 317.

(g) See 4 Bing. 142.

BAYLEY B.—Many cases have certainly occurred without noticing this objection. In many of them it might have been urged ; but if on later consideration of it, it has been thought essential to state the amount, we must act accordingly. If interest is due on the face of the note, the inference would be that the arrest was for a debt consisting of interest as well as principal ; but if it is only recoverable as damages, it is not a part of the debt. We will confer with the other judges. On a subsequent day, the learned baron announced the opinion of the judges of the other courts to be, that it is necessary to state in the affidavit the amount of the bill or note sued upon. Rule discharged accordingly.

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MASON *against* POLHILL.

THIS action was brought in *Easter* term 1832, and stood for trial at the sittings after *Trinity* term ; but pending negotiations the trial was postponed. On the 2d *November* a fiat in bankruptcy issued against the plaintiff, after which the assignee proceeded against his wish, and before this term commenced, gave notice of trial, in the name of the bankrupt, for the sittings after it. A rule was obtained on 4th *May* by *Ryland*, calling on the plaintiff or his assignee to give security for costs, and for staying proceedings. Notice of the motion had been given. Cause was shown for the assignee, by *Chilton*, that the defendant did not show that he came promptly ; that he came too late in the term, which began 15 *April*, and that the assignees ought at all events only to give security for costs incurred after they took up the action. *Per Curiam*.—We are not informed by the assignee when he was

If assignees of a bankrupt go on with an action brought by him before he became bankrupt, they must find security for the costs incurred, as well before as after the fiat. When the action was brought in *Easter* term, and a fiat was issued against the plaintiff on 2 *Nov.* and before the next *Easter* term the assignee gave notice of trial for the sittings after *Easter*

term, the motion for security for costs was allowed late in that term.

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appointed to that office. As to coming promptly, the case is for piracy of a literary work; it would hardly be tried at the sittings in term, and the plaintiff's position is not altered by the notice for the sittings after. This is not a case of irregularity, but is occasioned by an intervening bankruptcy. As the assignee goes on for his own benefit he must find security for all the costs.

Rule absolute.

REAY and Others *against* WHYTE and Another.

The plaintiffs had, with other creditors of the defendants, signed an agreement to take 5s. in the pound by way of composition on their debts, to be paid by bills at four and eight months date. The balance of the defendants' debt to the plaintiffs was not at

that time adjusted, and after various efforts by the latter to agree the balance with the plaintiffs, it remained unsettled till the eight months had nearly expired, when the plaintiffs threatened proceedings for the whole amount due to them from the defendants. The attorneys on both sides then met; for the plaintiffs a composition was demanded on the whole sum appearing due to them. For the defendants it was objected that the composition claimed would, with certain wines deposited with them by defendants as a security, give the plaintiffs more than 20s. in the pound. It was then said that the balance claimed by the plaintiffs was 321l.; to which the defendants' attorney replied, that he was ready to pay 5s. in the pound on that sum. For the plaintiffs it was answered, that they would not take less than their whole demand. Held, that, under these circumstances, the tender of the composition money on the balance was dispensed with, and that the plaintiffs could only recover such composition thereon.

ASSUMPSIT by plaintiffs as drawers against the defendants as acceptors of a bill of exchange, dated 31 Dec. 1830, for 1039l. value in wine, payable six months after date, with a count for goods sold. Plea, general issue. At the trial before Lord *Lyndhurst* C. B. at the Guildhall sittings, the plaintiffs, who were wine-merchants, sought to recover from the defendants, who had been in partnership as wine and spirit brokers, a sum of 321l. 9s. 3d., the balance of their account with the defendants, after crediting them for certain wines deposited with the plaintiffs as secu-

rity at the time of the defendants' arrangement with their creditors, and which had been valued by the plaintiffs' broker, and for brokerage due to them before that date. On 11 *July* 1831, the plaintiffs, with the other creditors of the defendants, signed a memorandum of that date, agreeing to take 5*s.* in the pound composition for the defendants' debts to them, to be paid by equal instalments, to be secured by bills at four and eight months, (*viz.* 11 *November* 1831, and 11 *March* 1832,) the creditors to execute a general release on those instalments being duly and punctually paid. The balance due to the plaintiffs on their account with the defendants was then unsettled, the plaintiffs claiming 321*l.* and the defendants only allowing 250*l.* to be due. The plaintiff's said they would settle it with *Whyte*. While it was in course of adjustment, the plaintiffs repeatedly told the defendants' agent, who urged them to settle the balance, that they had agreed to do as the other creditors did, and would do so when the account was settled. The defendants' efforts to settle the balance having proved fruitless, no offer was made by the defendants to pay the dividends at the days fixed, but on 24 *April* 1832, the defendants' attorney wrote to the plaintiffs' attorney that he was authorized to pay the composition money on the balance of their account if they would accept it, and that the balance had been ascertained after a valuation of the defendants' wines in the hands of the plaintiffs by their own broker. At a previous meeting between the plaintiffs' and defendants' attornies, the latter said he was ready to pay the composition, but that the balance on which it was due was not agreed. The plaintiffs' attorney claimed a composition on the whole of their demand against the defendants. It was answered that that, with the wines in hand, would give the plaintiffs

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more than 20*s.* in the pound. The plaintiffs' attorney said, the balance claimed by them was 321*l.* The defendants' attorney said, he was ready to pay 5*s.* in the pound on that sum; but the other replied, his clients would not take less than the whole of their demand. The date of this meeting did not clearly appear, but seemed to have been in *February*. At the trial, the defendants having proved the plaintiffs' agreement to take the composition of 5*s.* in the pound, contended for a nonsuit on that ground; to which the plaintiff answered that they were not bound by that agreement, as the defendants had not tendered the amount of composition money due on the balance. The chief baron inclined to the opinion that the defendants were bound to tender the composition bills on the balance of 321*l.* in time, in order to prevent the plaintiffs from suing for their whole debt, but reserved the point. The defendants then called witnesses to show that their wines in the plaintiffs' hands had sold at a higher rate than was allowed for by the plaintiffs; but the chief baron thought that useless after the defendants had offered to pay 5*s.* in the pound upon the balance of 321*l.* claimed by plaintiffs. Verdict for 321*l.* with leave to move to enter a nonsuit, or reduce the damages to the amount of the composition on the sum recovered.

Andrews Serjeant, afterwards moved to reduce the damages to 80*l.* 7*s.* 4*d.*; saying that the tender of the composition could not be made at the first stipulated day, because the defendants' wines in the plaintiff's possession had not then been valued. The *Court* intimated that the defendants might have tendered or paid into court what they conceived to be the balance due after deducting the value of the wines.

Richards and *C. Turner* showed cause.—The terms of the agreement for composition were not complied with

by payment of the instalments at the days fixed. Then *Cranley v. Hillary* (a) is in point to show that the plaintiff's debt, and his remedy to recover it, is not extinguished by that agreement. Lord *Ellenborough* there states the rule to be, "That the person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes (b) at the time of action brought, it might have been a ground for staying the proceedings." In *Shipton v. Casson* (c) the same rule was recognized, but it was held that though the instalment was paid too late, the plaintiffs, by receiving it without objection, had taken the case out of it. In *Good v. Cheeseman* (d) the creditors were to do an act essentially preliminary to any payment of composition money by the debtor, viz. to appoint a trustee to receive the amount, and their neglect to do so was accordingly held to exonerate the defendant from liability, he having been always ready to do his part, *Thomas v. Evans* (e) shows, that to make a legal tender there must either be an actual offer to pay by producing the money, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor; and his saying he would not receive any thing less than his whole demand will not dispense with the offer of the money. [*Bayley* B. There a plea of tender was pleaded, so that the defendant was bound to prove a tender, and could not show that it was dispensed with.]

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Andrews Serjt. and *Hoggins* contra were stopped by the court.

(a) 2 M. & S. 120. See Litt. sect. 340, and 11 East, 390.

(b) The payment there stipulated for was to be in promissory notes at certain dates.

(c) 5 B. & Cr. 378.

(d) 3 B. & Adol. 528.

(e) 10 East, 101.

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LORD LYNDHURST C. B.—The facts proved were, that the plaintiffs had agreed to come in and take a composition at the same rate as the other creditors when the balance of account between them and the defendants should be adjusted. Many applications were made by the plaintiffs' agent to get the defendants to settle the account, before the first instalment of the composition became due, but without success, and the different sums of 321*l.* and 250*l.* were named by the parties as the balance due. At last, after the day for paying the first instalment had passed, but before the action was brought, the defendants' attorney told the plaintiffs' attorney that the defendants were ready to pay 5*s.* in the pound on the 321*l.* which they the plaintiffs claimed; but the other having first insisted on his clients' right to receive a composition on 1153*l.*, said they would take no less than the balance of 321*l.* I think that that offer by one professional man to the other, while acting as agents for the different parties, was sufficient as between the parties, and dispensed with a formal tender of the dividend on the balance due.

BAYLEY B.—This is a case not between the plaintiffs and the defendants alone, but between the plaintiffs and the other creditors. It is proposed by *Whyte*, in *July* 1831, to make the defendants new men, by the creditors taking 5*s.* in the pound on their debts, and that only; it was the interest of the creditors that all of them should come in and get paid pro rata on their respective debts, and they accordingly signed a memorandum acceding to the proposition. A difference which existed at this time between the plaintiffs and defendants, as to the amount of the balance due to the former, was agreed to be the subject of future adjustment, but there was a distinct recognition that

when adjusted, the plaintiffs had agreed to do as the other creditors did, and would do so. It was afterwards ascertained that the plaintiffs were entitled to a dividend, not on 1153*l.* but on 321*l.* only. Then, has any thing equivalent to a tender been done by these defendants? No formal tender has been made on their behalf, but after their offer to pay a dividend on the 321*l.*, and the refusal on the other side to take less than their whole demand, I think none was necessary.

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VAUGHAN B.—If the plaintiffs' attorney had not dispensed with the tender in the manner proved, the defendants' attorney ought to have gone further. As it stands he has done all that was necessary. *Jones v. Barkley (a)* shows that where two parties agree to perform each a particular thing at the same time, he who was ready and offered to perform his part, but was discharged by the other from so doing, may sue the other for not performing his part.

BOLLAND B.—I think that under the circumstances the necessity for making the tender was dispensed with.

Rule absolute to reduce the damages (*b*).

(a) Doug. 684.

(b) See *Bignall v. Ellis*, 5 M. & R. 165; *Thomas v. Courtney*, 1 B. & Ald. 1; *Lewis v. Jones*, 4 B. & Cr. 506; *Turner v. Hoole*, 1 D. & R. N. P. Cases, 27. cor. *Abbott*, C. J.



1882.

DOE *against* ROE.

If a declaration in ejectment contains demises not only stating the names of the lessors of the plaintiff, but also the character in which they demised, (e. g. A. and B. "being executors" demised,) the affidavit of service of the declaration need only state their names in order to obtain judgment against the casual ejector.

HAYES moved for judgment against the casual ejector. The officers had hesitated to draw it up because the title of the affidavit of service did not correspond with the declaration in stating the lessors of the plaintiff to be assignees and executors. The declaration contained three demises by the same parties, who were stated in the first to be executors, and in the second to be assignees. The third stated their names without any special character.

Per Curiam.—The declaration is, that the lessors of the plaintiff "being executors" demised, not that they 'as executors' demised. Then as the title of the affidavit of service states their whole names correctly the motion may be granted (a).

(a) See *Doe v. Roe*, ante, vol. ii. 158.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

TRAPPES *against* HARTER and Another, Assignees of
JOSEPH and JEREMIAH FIELDING, Bankrupts.

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CASE. The first count was for injury to the rever-
sionary interest of the plaintiff in certain closes and
buildings at *Catterall* in the parish of *Garstang* in *Lanca-*

In 1797 pre-
mises in *Lan-*
cashire, de-
scribed as
"land, a
dwelling-

house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm, for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property.

In 1828 two of the partners, (then seised in fee of the freehold land and buildings under a conveyance, not mentioning machinery or fixtures,) mortgaged them for a term; "and also the steam-engine, mill gearing, heavy geer, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof." They remained

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shire, in the possession of *Joseph and Jeremiah Fielding*, as tenants to the plaintiff, in taking away certain engines, machines, utensils, fixtures, and things affixed and fastened to the said closes and buildings. The second count laid the possession to have been in the defendants. A count in trover. At the *Lancaster* spring assizes 1832, before *Patteson J.* a verdict was found for the plaintiff on the general issue, for the damages laid in the declaration, subject to the opinion of the court on the following case. The plaintiff, an attorney, is mortgagee of certain freehold premises from *Joseph and Jeremiah Fielding*, calico printers, at *Catterall* in the parish of *Garstang* in the county of *Lancaster*, who became bankrupts after the mortgage. The defendants, as their assignees, sold and removed the machinery affixed to the premises, which is the injury complained of. The business was formerly carried on under the firm of *Henry Fielding and Brothers*, *Henry Fielding* being the principal partner. The works were very extensive, and were carried on in premises partly held under lease, and partly freehold. In *January 1797*, the partners were *Henry Fielding, W. Myers, B. Fielding* and *J. Fielding*; and in that same *January*, certain premises called the *Adamsons*, on which the works in question principally stand, were conveyed by *J. W.* to *H. Fielding*, in fee, by lease and release dated 12 and 13 *January 1797*. This conveyance mentions the premises to consist,

in possession and carried on the works till 1829, when they compounded with their creditors, and afterwards, till they became bankrupts. In *April 1831*, their assignees sold and removed the machinery and utensils, except two steam-engines with the first motion and main shafts attached to them, and two water wheels, which supplied power to the rest.

Held, 1st, That the machinery and utensils so removed having been affixed to the inheritance for the purposes of trade only, in a place where, as such, they would have commonly been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only which passed to the assignees of the bankrupts.

2dly, That the mortgage deed was only intended to pass that part of the machinery which from the circumstances of its erection necessarily became part of the freehold.

besides land, of dwelling-houses, machine-house and other buildings and erections, then in the possession of *H. Fielding* and *W. Myers*. At the time of this purchase, the concern was indebted to *H. Fielding* in a much larger sum than the purchase money; but the premises, though conveyed to *H. Fielding* alone, were used and considered by the firm as partnership property. Additional purchases were made, and various buildings erected on the premises from time to time for extending the works. In the stock-takings commencing in 1804, and ending in 1825, the lands and buildings were called the *Catterall Plant*, and were valued and classed separately from the machinery and fixtures.

No distinction was made between the machinery on the freehold and leasehold premises, or in the repairs and alterations that were made from time to time. The stock-takings were annually signed by all the persons interested, and till 1811 were in the handwriting of *H. Fielding*. From 1804 till the death of *H. Fielding* on 9 October 1816, the partners were *Henry, Joseph, Jeremiah* and *James Fielding*, and *E. Margerison*. *H. Fielding* left a widow, one son and three daughters. The surviving partners carried on the business after his death under the firm of *H. Fielding and Brothers*, for the benefit of themselves and the widow and children, till 1 July 1825, when the copartnership ceased. The stock-taking in 1816 was signed by *Susannah Fielding*, the widow, by the surviving partners, and by *Mary* and *Susannah Fielding*, two of the daughters, that of 1817 by all the same parties. Those of 1818 and 1819, by the partners and the two daughters only. The stock was not again taken till 1823, when it was signed by the same parties as the last. The stock-takings in 1824 and 1825 were signed by the same parties, and *Henrietta Fielding* another daughter.

In taking the account at the dissolution in 1825, the lands and buildings, as well as the machinery and stock,

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were considered as partnership property. *Margerison* then left the concern, taking with him a considerable sum as his share. The widow's share was estimated at 11,655*l.* 16*s.* 3*d.* and was left at interest in the concern, which was carried on by *Joseph, Jeremiah,* and *James Fielding*, still under the firm of *H. Fielding and Brothers*, till their stoppage in *August 1829*. On *24 January 1826*, *H. B. Fielding* being then of age, as son and heir of *H. Fielding*, conveyed all the freehold premises and buildings to *Joseph and Jeremiah Fielding*, no mention being made of the machinery or fixtures.

On *1 January 1828*, *Joseph and Jeremiah Fielding* conveyed for a term of 1000 years, by way of mortgage, to secure the said sum of 11,655*l.* 16*s.* 3*d.* with interest at 4*l.* 10*s.* per cent. per annum, to *Mary Fielding*, the eldest daughter of *H. Fielding* as the executrix of her mother, who was then dead, all the messuages, tenements, dwelling-houses, lands and buildings therein-before mentioned" (being the same which were conveyed to them by *H. B. Fielding* in 1826.) "And also all that and those, the steam-engines, mill gearing, heavy geer, millwright work fixed, machinery and other matters and things erected and then standing and being in or upon the said thereby granted and demised buildings, works and premises, which in any manner constitute fixtures and appendages to the freehold or any part thereof: together with all and singular houses, outhouses, edifices, buildings, warehouses, workshops, engines, barns, stables, yards, &c. &c. water, watercourses, rivers, streams, brooks, dams and falls of waters, &c. &c. hereditaments and appurtenances whatsoever to the said hereditaments and premises mentioned to be hereby granted and demised, belonging or in any ways appertaining." This mortgage did not appear to have been made known to any person before the stoppage in *August 1829*.

On 25 August 1829, *Mary Fielding*, the mortgagee, married the plaintiff *Trappes*. In the same month 1829 Messrs. *F.* found themselves in difficulties, and called their creditors together. The land, buildings and machinery were valued by competent persons, and a statement of their affairs was made out, on the debit side of which *M. Fielding* (wife of the plaintiff) was stated to be a creditor for 9087*l.* 14*s.* 7*d.*, *S. Fielding* for 8899*l.* 2*s.* 10*d.*, Mrs. *John Clay* for 5700*l.*, with other debts, in all about 105,207*l.* 8*s.* 10*d.* On the credit side were among other items, estimated value of the buildings at the works 11,773*l.*, of the land 2079*l.*, making together 13,852*l.* Under this sum, in an inner line, was "Deduct Mrs. *Fielding's* (plaintiff's wife's) mortgage 11,655*l.* 16*s.* 3*d.* (leaving 2196*l.* 3*s.* 9*d.* surplus for the other creditors.) Then followed, as another item, estimated value of machinery at the works 8649*l.* 2*s.* 11*d.*,; in all 43,595*l.* 3*s.* 6*d.* The *M. Fielding* mentioned in the statement as a creditor for the additional sum of 9087*l.* 14*s.* 7*d.*, is the wife of the plaintiff, and *S. Fielding* and Mrs. *J. Clay* are her sisters, who are likewise beneficially interested in the mortgage. In this statement, the valuation of the land and buildings does not include any of the machinery now claimed by the plaintiff; the whole of the fixed machinery, both on the freehold and leasehold premises, is included in the subsequent item of machinery at the works, 8649*l.* 2*s.* 11*d.* This statement was submitted to a meeting of the creditors held at *Manchester* on the 22d of September 1829, at which Mr. *Trappes* the plaintiff, and the Rev. *John Clay*, who had married *Henrietta Fielding*, were present. Mr. *Harter*, one of the present defendants, presided, and read and explained the statement to the creditors. Immediately after stating the amount of the land and buildings at 13,852*l.* Mr. *Harter* said, "Deduct Mrs. *Fielding's* mortgage of 11,655*l.* 16*s.* 3*d.* which leaves 2196*l.* 3*s.* 9*d.* available to the creditors."

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The mortgage was not produced or asked for at the meeting; some of the creditors asked if that was a valid mortgage and when it was given; Mr. *Harter* said he believed it was, and that it was given in *January* 1828. A creditor said, that according to the statement the concern must have been at that time insolvent, and the mortgage bad. Mr. *Harter* said he believed it was a good valid mortgage. There was a discussion about the correctness of the statement. Several of the creditors made notes and extracts from the statement as it lay upon the counter. Neither the plaintiff nor Mr. *Clay* made any observation. The mortgage was called Mrs. *Fielding's* by the mistake of the accountant. It ought to have been called Mrs. *Trappes'* mortgage.

The statement showed 8*s.* 3*d.* in the pound, and an agreement was prepared the same day, by which the creditors agreed to accept 8*s.* in the pound as a composition on the amount, and in full discharge and satisfaction of their debts, to be paid at 6, 12, and 18 months, by the notes of *Joseph* and *Jeremiah Fielding*. Upon payment of the composition *Joseph* and *Jeremiah Fielding*, and *James Fielding* of *London*, were to be absolutely discharged. The agreement was to be void unless signed by all the creditors before 1 *Nov.* The statement was again shown to the plaintiff, and the surplus value of the mortgaged buildings and land pointed out. He took time to consider, and afterwards signed the agreement as to the debt of 9087*l.* 14*s.* 7*d.*

A deed was prepared, pursuant to the agreement, dated 2 *November* 1829, to which the plaintiff and his wife were parties, and which was also signed by the plaintiff and his wife, and by the rest of the creditors. The deed, after reciting as well the debt of 11,655*l.* 16*s.* 3*d.* due on mortgage, as the additional debt of 9087*l.* 14*s.* 7*d.* due to the plaintiff and his wife, and the debts of *S. Fielding*, Mrs. *John Clay*, *H. B. Fielding*,

F. H. Fielding, and *J. Fielding* of *Catterall*, and that *H. B. Fielding*, *F. H. Fielding*, and *J. Fielding* of *Catterall*, had agreed to postpone the payment of the composition on their debts until the 1 *May* 1836, and that *James Fielding* of *London* had taken no active part in the business, and had only a small share in it, and intended to withdraw from it; and that the business was intended to be carried on by *Joseph* and *Jeremiah Fielding*, and that composition notes had been given to the creditors, and that it had been agreed that in case the interest to become due in respect of the said mortgage of 11,655*l.* 16*s.* 3*d.* from 1 *May* 1831, should be duly paid at 5 per cent. instead of the present rate of 4½ per cent., no proceedings should be instituted for the recovery of the principal till 1 *July* 1836. *Joseph Fielding* and *Jeremiah Fielding* covenanted to pay the composition notes, and the creditors, in consideration of the premises, released *Joseph* and *Jeremiah Fielding*, and *James Fielding* (of *London*), of all their debts, except the mortgage. *Joseph Fielding* and *Jeremiah Fielding* then covenanted to pay interest on the mortgage, and the plaintiff covenanted to forbear to sue if the interest is regularly paid. All parties covenanted that the mortgage should not be otherwise affected. Lastly, there was a proviso that in case of a commission of bankrupt issuing against *Joseph* and *Jeremiah Fielding*, all the parties should be at liberty to prove their debts against them in the same manner as if that deed had not been made.

After this composition, *Joseph* and *Jeremiah Fielding* continued to carry on the business of calico printers as before, both at *Catterall*, at *Manchester*, and in *London*. They employed 500 or 600 persons at the works, and obtained credit from old customers to the amount of 20,000*l.*, and from new customers to the amount of 10,000*l.* of which 30,000*l.*, 10,000*l.* was

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unpaid at the time of the bankruptcy. They obtained no sums upon deposit after their stoppage. They had all the machinery in their possession, order and disposition, and were the reputed owners thereof; they replaced some of the water pipes with new ones, and repaired a steam-boiler at the expense of 120*l*. No notice was given to the other creditors, before the bankruptcy, that the machinery was included in the plaintiff's mortgage, nor did any of the creditors ask to see the mortgage, nor was any further explanation of it either asked or given. It did not appear that such notice was omitted to be given for the purpose of deceiving the other creditors, though several of them trusted the bankrupts who would not have done so if they had known the machinery was so included.

The business turning out unsuccessful, and default being made in the payment of the instalments on the composition, a commission of bankruptcy was sued out, under which the defendants were appointed assignees. The whole machinery and other property at the works was in consequence sold in *April* 1831, with the exception of two steam-engines, two water wheels, an iron flooring, and some other small articles(*a*); the greater part of which were removed by the purchasers. The articles claimed by the plaintiff were all firmly fixed to the freehold, yet in such a manner that they might easily be removed without any material injury to themselves, or to the buildings. They are also things which are very commonly sold and removed.

All kinds of works are very commonly held by tenants, particularly cotton factories, and bleaching works; in the latter, great part of the machinery is the same as in print works. In many cases only the land and buildings are the property of the landlord, and the

(*a*) *e.g.* Pillars, wall boxes and ashlar, p. 611. And the first motion shafts attached to the steam-engines, with the wheels on them, p. 612.

whole of the machinery is put in by the tenant; it is very usual for the steam-engine or water wheel to be the property of the landlord. Frequently the shafting and geering is also the property of the landlord, though the rest of the machinery belongs to the tenant. Sometimes the whole of the machinery and utensils, both fixed and movable, belongs to the landlord. In all these cases no objection is ever made to the tenant or his assignees removing whatever machinery is put up by himself: on a change of tenancy it is often valued to the incoming tenant or purchased by the landlord. The machinery of print works has less frequently been the property of the landlord than in other works, from the excise being in the habit of seizing it and selling it under the 7 & 8 G. 4. c. 53. s. 28. and other prior acts for arrears of duty. For the same reason mortgages of printing machinery are very uncommon, as not being an eligible security. In some instances the landlord advertises the machinery to be his, to rebut the presumption of apparent ownership in the tenant. Advertisements for the letting of works both with and without machinery are very common, and also for the sale of machinery. There are persons who call themselves machinery brokers, and who make it their business to attend sales and purchase machinery to sell it again. Machinery may be considered as producing about half its original cost price at sales.

The sale at the *Catterall* works was a good sale. None of the pillars, wall boxes, or ashblars were sold. The purchasers were told that the machines were to "be removed at bolt (a)." They were removed in the usual way, with as little damage to the freehold as could be expected. Most of the damage was afterwards repaired by the defendants. It would take 150*l.* to put the premises into complete tenantable repair; that

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estimate including the repairs of the floors and beams, which were originally cut and injured to receive and fix the machinery: 50*l.* would be sufficient to fit them for receiving similar machinery; that estimate including the repairs of windows and roofs and other accidental damage; the injury done to the buildings by the actual removal of the machinery had been nearly all repaired by the defendants; what remains would not exceed 5*l.* The premises were left in a better condition than works are usually left in after the removal of machinery.

The two steam engines with their boilers complete, and with the first motion shafts and wheels upon them, were not sold or removed; the two water wheels were also left; the residue were divided into six classes(*a*).

The first. The shafting, gearing, pedestals, and pedestal plates. Shafts are heavy bars of cast iron turned by the moving power, and conveying motion from the steam engines and water-wheel to the works. They are coupled or connected with spur or bevel gearing, which consists of toothed wheels working into each other. Shafts rest and turn in semicircles of brass called steps, which are placed in and bolted to iron pedestals by iron caps with nuts. Shafts may sometimes be removed by unloosing the caps only. The steps and pedestals are essential to shafting. There are side, gallows and stand pedestals. They require to be very firmly fixed, and are either built into a wall or bolted down by nuts to bolts in iron pillars or wall boxes of iron let into the wall; in which case they are easily detached by unscrewing the nuts, leaving the bolt; which is called "removing at the bolt." Stand pedestals are placed on beds or pillars of ashlar or masonry, made on purpose to support

(*a*) It has been attempted to select and condense from the minute and elaborate particulars stated in the case (illustrated by drawings in the margin), what appeared to be indispensable to understanding the nature of the articles claimed as fixtures.

them; through these, long bolts pass to the bottom, where they are fixed with iron plates, while the other or screw ends stand up a few inches above the ashlar. These pedestals are either placed immediately on the ashlar, and fastened there with nuts, or plates of iron called "pedestal plates" are interposed, which are bolted to the ashlar, and the pedestals to them. The articles claimed by the plaintiff in this class were of the above description, and were fixed in some one or all of the above methods. The cast iron pillars to which side pedestals were fixed, the ashlar with the long bolts in it, and the wall boxes, were not removed. The motion was conveyed from the main shafts by cross shafts with spur or bevel wheels or gearing. Second-hand shafts are often sold, and put up in other buildings.

The second. The steam apparatus, consisting of steam and colour pans not connected with any engine, and boilers, steam pipes and chests for heating the rooms, dye vats, &c. and securing a rapid process of drying. The pans and boilers were set up in brick-work unconnected with the walls, in which archways were left slightly filled up with brick, in order to be pulled down when the pans &c. were wanted to be removed for repairs. The assignees removed them through these archways.

The third. The machinery, viz. cylinder machines consisting of strong cast-iron framing with cast-iron cylinders, round which blankets of great length go like an endless band, and pass with the calico to be printed between the cylinder and an engraved copper roller, which presses the calico against the face of the cylinder so as to engrave it. These machines are bolted to sleepers, and were removed by unscrewing the nuts. They were driven by spur gearing.

Wince stands, lathes, steam drying, milling, mangling, calendering, padding, and winding machines, with lever squeezes, all driven by connecting gearing from the

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main shafts, were fixed by bolts and nuts to iron, stone, or wood frames, and were removed by taking off the nuts.

The following articles were also claimed by the plaintiff—An hydraulic press with its iron pillar and framing. Its lower plate was not fixed at bottom to the beam on which it rested ; but the top plate was bolted to iron stays nailed to the beams above. The pillar rested on a sleeper. Several large drum wash wheels of wood, and hollow in the inside with four partitions. They were built on thin shafts, and could not be taken off without great injury. They had four round holes on one side, each fourteen inches in diameter, where the cloth was put in to be washed, by being thrown from side to side of the partitions. Water was introduced on the other side by spirit pipes. The wheels were turned round by connecting shafts, and were thrown in and out of gear by a sliding catch box and friction hoop. The shafts were supported in front by side pedestals, and behind by pedestals with plates on an ashlar bench. They could not be got out of the room without pulling down the wall which had before been pulled down to get them in : they might have been lifted up by taking off the caps of the pedestals. They were sold and removed with their pedestals, steps, and geering. The cylinders and wash wheels require to be very firmly fixed, being irregular in motion, and taking a great deal of power. Roller racks, wooden levers, hanging rails, a lever weighing machine for carts, supported below by a main iron pillar bolted to the ashlar, and at top by four iron arms built into the walls.

The fourth. Cisterns and vats (a), some of stone, and others of timber framing uniting the whole vessel, and filled up with brick work lined with lead, were let into the floor or ground from one to seven feet in depth ; some

(a) See *Horn v. Baker*, 9 East, 215.

were fastened to the walls by lead nails or cement, which with the brick work were cut to remove them; others, fixed by bolts and nuts, were removed by unscrewing the latter; one was removed by cutting away a corner of a door-way which had been previously so cut for a like purpose; others let into the ground were lifted out, leaving the holes open; some of them stood on iron bearers, but were not fixed to them.

The Fifth. Water pipes from the reservoirs passing to the cisterns through the banks of the reservoirs, and under the floors of one of the houses. The backs and floors were cut and taken up to get the pipes out.

The Sixth. Cast iron stove pots, with flue pipes for drying presses, passed through the room.

Each party was to be at liberty to refer to the pleadings in the cause.

The questions for the opinion of the court were, Whether the plaintiff be entitled to recover any and what damages under the above circumstances? and what judgment ought to be entered on the record?

Tomlinson for the plaintiff. The articles now in dispute were affixed to the freehold premises. The case states them to have been firmly fixed to the freehold; then the reputed ownership of the bankrupts conferred no right of possession on the defendants, so as to justify their removing them as assignees. Between mortgagor and mortgagee the rule against removing fixtures applies in its ancient strictness. [Lord *Lyndhurst* C. B. The question is, whether these articles are fixtures? and it arises between mortgagees and a mass of other creditors.] These articles are fixed in various ways; in particular, the wash wheels, steam boilers, vats, cisterns, pipes, &c. were removed by breaking the walls, floors, and banks (a). As between the mortgagee and the assignees they were the property of the former,

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(a) See *Lawton v. Lawton*, 3 Atk. 13, 14; and 3 East, 43.

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and not removable. The law as to the reputed ownership of bankrupts does not apply. Stat. 6 G. 4. c. 16. supplies no test of trying what are "goods and chattels" within its purview; nor is reputation such a test. The mode of dealing with these articles cannot alter their quality. But the question, what are such goods and chattels, depends, first, on the nature of the property; and, secondly, on the contracts entered into respecting it. Then if the articles in question, though once goods and chattels, were not so at the time of the stoppage, the assignees cannot remove them. At the stock-takings the land and machinery were taken together, and the bankrupts, after from time to time annexing much new machinery to the freehold premises, mortgaged both.

[*Bayley B.* At the time of the mortgage the actual interest in the property was in three parties, *Joseph, Jeremiah, and James Fielding*. On the nature of that interest depends the question whether the articles were goods and chattels or not. At the time of the mortgage the freehold was not in the mortgagors only, for another person, *James Fielding*, was always interested.]

At the last stock-taking, the lands, buildings, and machinery were without distinction stated to be the stock of the bankrupts *Joseph and Jeremiah Fielding*. They, therefore, as possessing the legal interest, might mortgage, and the mortgagee might sue their assignees at law, treating the whole as real property as against them, though in equity the whole was personal property subject to a trust for *James Fielding* as well as the mortgagors. The articles in question were real property annexed to the premises, not by tenants but by owners of the freehold; but if they were only personalty, as having been affixed by successive tenants, still by their mortgage of the land and machinery together, the latter acquired the character of freehold for the security of the mortgagee, and a subsequent change of property by

bankruptcy would not affect the title of the latter. [*Bayley* B. Was the machinery originally erected at the joint expense of the concern? and if it was, was it the property of *Henry Fielding* only, or of *Henry Fielding* and the other partners?] At law it was the property of *Henry F.* only, by whose consent as owner of the freehold it was affixed; he never was a tenant but was in fact landlord to the other two. It is not found what machinery existed before the conveyance to him in 1797. [Lord *Lyndhurst* C. B. If several partners put up machinery on the freehold of one of them for the purpose of carrying on their partnership trade, how does it become the property of that one partner who is owner of the freehold?] *Ryall v. Rolle* (a) is the first case where fixtures were held not to be goods and chattels within the bankrupt act 21 Jac. 1. c. 19. *Horn v. Baker* (b) is a stronger case than the present, for there the distillery premises were not freehold, but let to *A.* and another; the stills, vats, and utensils necessary to carry on the trade, were the property of *A.* and fixed to the freehold. *A.*, *B.* and *C.* carried on the trade as partners, and used the stills &c. in common. The partnership was dissolved, *C.* and *J.* were to occupy the premises and the stills &c. paying the reserved rent and an annuity to *A.* They entered and continued in possession of the stills &c. till their bankruptcy. It was there held, notwithstanding the reputed ownership of *C.* and *J.*, that the stills which were fixed to the freehold did not pass to their assignees as goods and chattels, though the vats and utensils not so fixed did: no distinction was there taken as to the time of the erections. [Lord *Lyndhurst* C. B. That case is not in point, for there the stills, vats, and utensils had been put up, not by partners, but by the lessor *Horn*, before the bankrupts were by deed permitted to use, occupy, and enjoy them;

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(a) 1 Atk. 163; 1 Ves. sen. 348.

(b) 9 East, 215.

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it only shows that a party who lets fixtures with the premises cannot be deprived of them by the assignees of the bankrupt lessee (a). A mill or steam-engine may be a fixture (b), but here many other things are affixed to those moving powers, upon the condition of which there may be more doubt. *Bayley B.* Here the question is, Were these articles fixtures or not? That depends on the time when they were erected. If they were erected by *Henry Fielding* then they were his; if erected by him and others, it may turn out that *quoad* other parties they may be goods and chattels.]

In *Clark* and another, assignees of *Liversege v. Crownshaw* (c), *Liversege* and the defendant took a lease of a mill and iron forge, and bought the fixed and moveable implements. They dissolved partnership afterwards, and *L.* conveyed his interest in the premises and implements to the defendant as security for a debt,

(a) And see *Farrant v. Thompson*, 5 B. & Ald. 826; *Storer v. Hunter*, 3 B. & Cr. 368; *Clark v. Crownshaw*, 3 B. & Adol. 804; *Steward v. Lamb*, 1 Brod. & B. 503.

(b) In *Hubbard v. Bagshaw*, 4 Simons's R. 326, the bankrupts having the fee in a mill mortgaged it, "with the steam-engine and engine-house, boilers and boiler-houses, shops, warehouses, and counting-houses, to the same belonging and adjoining," besides some land, and remained in possession till their bankruptcy. On reference to the master to inquire whether the steam-engine, boilers, upright and tumbling shafts, gearing, and other articles in the pleadings mentioned, were in the order and disposition of the bankrupts at the time of their bankruptcy or not; he reported, that all except the steam-engine and boilers were, and that the latter articles were not. It was excepted to the report that the steam-engine was also in the order and disposition of the bankrupts at the time of their bankruptcy. No part of it was fixed to the freehold, except the entablature plate which encircled a beam, and was fixed above to the chamber floor of the engine-house, by being floored round there with timber or flags, so that it could not be removed without injury to the walls or floors of that building; but it was not part of the working apparatus, its use being to fasten the engine, the other parts of which were not fixed to the freehold, otherwise than by bolts and screws. The Vice-Chancellor overruled the exception, holding that the steam-engine was not in the order and disposition of the bankrupt, and did not pass to the assignees. He cited *Ryalls v. Rowles*, 1 Ves. 375; *Steward v. Lamb*, 1 Brod. & B. 506.

(c) 3 B. & Adol. 804.

in trust to enter and sell, if certain instalments were not paid. *L.* afterwards carried on the business, repaired, altered, and added to the machinery, and became bankrupt. The whole of the articles fixed to the freehold were adjudged to belong to the assignee, without distinction as to the part added by *L. (a)* at the time of erecting them. [Lord *Lyndhurst* C. B. For all that appears, the addition by *Liversege* to the machinery in the year he held it, might be trifling; as for example, a cog to a wheel, &c. Machinery of this kind is found to be continually bought and sold, and removed; new machinery being put into communication with the moving power. It also appears by the case, that very large additions to this machinery were made after 1797. The inference from that remote date is, that since the original purchase by *H. F.* much new machinery was placed on the premises. The deed of 1797 mentions a machine-house without machinery, though probably some was then there. Where a landlord lets a building only, there, as the tenant might during his term take away the machinery, the right of his assignees would attach however it might be fixed. Fixtures, if removable by the person to whom they belong, *e. g.* the owner of the fee in possession, or tenant who has put them up or bought them, may be seized under an execution against him as his goods and chattels.] A tenant who puts up may remove during his term, but here the articles were firmly fixed to the freehold. [Lord *Lyndhurst* C. B. No doubt; but the screwing a stocking-frame to a floor to keep it steady does not make it a fixture.] Not as between landlord and tenant; though it may be so as between mortgagor and mortgagee. The removal of these articles lessened their value one half. He also mentioned *Colegrave v. Dias Santos (b)*, *Steward v. Lombe (c)*,

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(a) See *Storer v. Hunter*, 3 B. & Cr. 368.

(b) 2 B. & Cr. 76.

(c) 1 Br. & B. 506.

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Attorney-General v. Gibbs (a), *Simpson v. Jonas*, K. B. Trin. 1832. If the above are fixtures, and being such have been wrongfully removed by the defendants since the marriage of the plaintiff with the mortgagee, this action is properly brought by the plaintiff alone as husband of the mortgagee; and the count in trover in particular, could only be maintained by him in his own name (b); *Blackborne and Others v. Greaves and Others* (c); *Farrant v. Thompson* (d).

Wightman for the defendants (the assignees). The articles specified neither passed nor were intended to pass by the mortgage deed; but if they did, still as they were removable between landlord and tenant, having been erected for the purposes of trade, they passed to the assignees as property in the reputed ownership of the bankrupts (e). The case finds that the articles in question were all firmly fixed to the freehold, but so as to be easily removed without injury to themselves or the buildings containing them. That relieves the court from minutely investigating the manner in which each article claimed as a fixture was fixed. *Quodammodo* affixed (f) to the freehold they doubtless were, but from 1797 downwards the whole was dealt with by the several partners as the property of the firm. The various stock-takings signed by the mortgagee recognized the machinery to be a separate description of property belonging to the general concern, and show that it was never contemplated that it should pass by the subsequent mortgage to her. In 1826 *H. B. Fielding*, as heir of *Henry Fielding*, conveyed the freehold pre-

(a) 3 Y. & J. 133.

(b) 1 Balst. 21.

(c) 2 Lev. 107.

(d) 5 B. & Ald. 826.

(e) It was also stated in the margin of the case for the defendant that the facts stated did not support the special counts, and that the plaintiff could not recover in trover.

(f) See per *Richardson J.*, 1 Brod. & B. 513.

mises and buildings to the bankrupts without naming fixtures, only meaning to pass such as under all circumstances must remain conclusively fixed to the inheritance irremovable by a tenant. All the articles contended to be fixtures were on the premises when *H. B. F.* conveyed to the bankrupts. In his conveyance no mention was made of machinery and fixtures, though in the bankrupts' mortgage to Mrs. *Trappes* the words "mill-geering" &c. were introduced. Now the machinery in question did not belong to the bankrupts alone, but to them and *J. F.* who lived in *London*. Again, when in 1829 they made a statement to their creditors of their debts and assets, they deducted their mortgage debt from the estimated value of the land and buildings, describing the machinery at the works as a separate matter disposable for the benefit of their general creditors. To this statement the plaintiff's attention was called, and he finally made no objection to it. [Lord *Lyndhurst* C. B. That statement of account was very like a representation by the bankrupts that the articles were not included in the plaintiff's mortgage. His attention was drawn to it, and he took time to consider before he signed the composition deed as to the 11,655*l.* 16*s.* 3*d.* That arrangement was with the old creditors.] On that basis new credit was acquired. Had these articles been put up by a tenant they might have been taken under a *fi. fa.* against him, as being fairly removable by him during his term as goods and chattels. They therefore pass to the assignees of the bankrupts, in whose order and disposition they were at the time of their bankruptcy. *Ex parte Austin* (a). Lord *Ellenborough*, in *Elwes v. Maw* (b) says, that in the cases of *Lawton v. Lawton* (c), and *Lord Dudley v. Lord Ward* (d) fire-engines erected by tenants for

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(a) Per Sir G. Rose J., 1 Dea. & Chit. R.

(b) 3 East, 53, 54.

(c) 3 Atk. 13.

(d) Ambler, 113.

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life to work collieries were accessories to the carrying on a trade, a matter of a personal nature, and being so should be themselves considered as personalty.

[*Bayley* B. There is another point, *viz.* that the legal interest in these articles is not in the persons who, having the legal estate in the premises to which they were fixed, mortgage those premises. Lord *Lyndhurst* C. B. That assists you in showing that the bankrupts did not intend to pass them by their mortgage deed; and if the words of that deed did not necessarily pass them, what passed between the parties to it may be taken into consideration to show their intentions. They mortgage in terms the "steam-engine, mill geering, heavy geer, millwright work, fixed machinery, and other matters and things which constitute fixtures and appendages to the freehold." Now, the mill, steam-engines, mill geering, heavy geering, millwright work, *viz.* the water wheels, appear to the world as fixtures, and are not removed. Then the subsequent qualified expression in the deed of "fixed machinery," may have been used with reference to the usage of trade by which it may be removed; meaning to convey not removable machines, but only permanent and irremovable appendages to the freehold. The terms do not appear so strong as to preclude a more limited meaning. *Bayley* B. The conveyance to the bankrupts contains no words specifically describing machinery or these articles.]

Had it been otherwise it would have interfered with the rights of *James Fielding*. He did not join in the mortgage. These articles have throughout been treated as personalty by the parties themselves, and there are no words in the mortgage deed which necessarily convey them.

[Lord *Lyndhurst* C. B. *Joseph* and *Jeremiah F.* take from *H. B. F.* Another party, *James*, is entitled

to partnership property; then what ground is there to presume from the subsequent mortgage by *Joseph* and *Jeremiah* that it was intended to convey that interest of *James*? If it had been intended that more than had been conveyed by *H. B. F.* to them should have been conveyed by them, or that the interest of all should pass, *James* would have been joined in the mortgage.] *Hubbard v. Bagshaw* is in point (a).

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Tomlinson in reply. Though at the time of taking stock in 1825 the whole machinery was considered as partnership and personal property, its annexation to the freehold took place at the time of the mortgage; for all the articles claimed as fixtures passed by the words of that deed either as furnishing power or acted on by it. Its words of qualification as to appendages to the freehold show the deed only to apply to the freehold premises. The equitable right of *James* passed by the mortgage of *Joseph* and *Jeremiah*, which bound him as the act of his partners, and was ratified by the subsequent deed of arrangement to which he was party. They, if only part owners of two-thirds, might have recovered them, unless nonjoinder of *James* was pleaded in abatement, *Addison v. Overend* (b). [*Bayley* B. There are words in the mortgage deed specifically conveying the engine; then if it was intended to pass the other articles claimed, why were not these words added, "and all machinery thereunto belonging and used therewith."] *Ex parte Austin* was between landlord and tenant, and the ultimate tenant might clearly remove against the landlord.

Cur. adv. vult.

(a) Not then reported. See 4 Simons R. 326. ante 618, note.

(b) 6 T. R. 766, confirmed 5 East, 440.

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In *Michaelmas* term the judgment of the court was delivered by

LORD LYNDHURST C. B.—The question was, whether the machinery, the subject of the present action, passed to the mortgagee by a mortgage deed granted by the bankrupts before their bankruptcy, or whether it became the property of the assignees under their commission. The bankrupts, it appears, had carried on the business of calico printers at *Catterall* in the parish of *Garstang* in the county of *Lancaster*, for many years. As to the lands and buildings that were purchased, a conveyance was made to one only of the partners; but it is quite clear that the whole estate was considered and treated throughout as belonging to the calico printers the bankrupts. That conveyance mentions the premises to consist, besides land, of a dwelling-house, machine-house, and other buildings and erections then in the possession of *W. Myers*. The machinery was erected by the partnership; it consisted of machinery erected for the purpose of carrying on the trade of calico printing, which might in general be removed by drawing it off the bolts fixed to the freehold. The whole was fixed to the freehold, and stood on that part of the land which was conveyed in fee to *Henry Fielding* in 1797. The buildings, land, and machinery, were occupied by the partners, collectively, and when either of them withdrew, the machinery still remained attached to the freehold. Great part of it was of a description which could be removed by drawing it off bolts fixed to the freehold after unscrewing the nuts which kept it steady to those bolts; that could be done without doing any material injury to the freehold, and a great part was so removed accordingly.

In taking the stock, it appears that the land and buildings were constantly placed under one head, and

the machinery under another. It also appears that machinery of this description is in that part of the country constantly bought and sold, without reference to the freehold. As between landlord and tenant, therefore, it is clear that such machinery put up by the tenant might be removed by him. The bankrupts were the reputed owners of the machinery, and in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor, and not to the heir, and that it was the partnership estate of the bankrupts. In his argument in *Lawton v. Lawton (a)*, Mr. *Wilbraham*, the counsel, compared the fire engine there in question to a cider mill which is let very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron *Comyns*, at the assizes at *Worcester*, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate notwithstanding, and directed the jury to find for the executor. In that case the material question was, "whether a fire engine set up for the benefit of a colliery by a tenant for life should be considered as personal estate and go to his executor, or as fixed to the freehold and go to a remainder-man." Lord *Hardwicke* in that case stated, "It is true the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently between an ancestor and an heir at law, or tenant for life and remainder-man; but even in those cases it does admit the consideration of public expediency for determining this question. I think even between ancestor and heir it would be very hard that such things should go in every instance to the heir.

(a) 3 Atk. R. 13; and see *Ex parte Quincy*, 1 Atk. 477.

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One reason that weighs with me is, its being a mixed case between enjoying the profits of the land and carrying on a species of trade: and considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers. The case too of a cider mill between the executor and the heir, mentioned by Mr. *Wilbraham*, is extremely strong; for though cider is part of the profits of the real estate, yet it was held by Lord Chief Baron *Comyns*, a very able common lawyer, that a cider mill was personal estate notwithstanding, and that it should go to the executor." Then he says, "Upon the whole, I think this fire engine ought to be considered as part of the personal estate of Mr. *Lawton*, and to go to the executor for the increase of assets;" and he decreed accordingly. In the case of *Fitzherbert v. Shaw* (a) there is a note giving an abstract of *Lawton* executor of *Lawton v. Salmon*, in which Lord *Mansfield* says, "All the old cases, some of which are in the *Year Books* and *Brooke's Abridgment*, agree that whatever is connected with the freehold, as wainscot, furniture, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir; but there has been a relaxation of the strict rule of that species of cases for the benefit of trade between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney pieces, and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between a tenant for life and a remainder man; if the former have been to any expense for the benefit of the estate as to erecting a fire engine, or any thing

(a) 1 H. Bls. 238.

else by which it may be improved, in such a case it has been determined that the fire engine should go to the executor, upon the principle of public convenience; it being an encouragement to lay out money in improving the estate which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of a tenant for life and a remainder-man as that of landlord and tenant; namely, that the remainder-man is not injured, but takes the estate in the same condition, and as if the thing in question had never been raised. But I cannot find between the heir and executor there has been any relaxation of this sort, except in the case of the cider mills, which is not printed at large. The previous case is very strong. A salt spring is a valuable inheritance, but no profit arises from it, unless there is a salt work; which consists of a building for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them; they are accessaries necessary for the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them, but the heir gains eight pounds a week by them. Upon the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, 'I leave the estate no worse than I found it.' That, as I stated before, would be for the encouragement and convenience of trade, and to the benefit of the estate. Mr. *Wilbraham*, in his opinion, makes a distinction between executor and tenant. For

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these reasons we are all of opinion that the salt pans must go to the heir." In *Elwes v. Maw (a)*, Lord *Ellenborough* seems to have entertained the same opinion, and cites the decisions of Lord *Mansfield* in *Lawton v. Salmon*, and Lord *Hardwicke* in *Lawton v. Lawton*.

Now these authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate.

The next question will be, whether, from the particular terms of the mortgage deed in this case, this machinery was intended to be included, and whether it passed by the mortgage deed? Upon that point we are of opinion that it did not pass by the mortgage deed, and that it was not intended to pass by it. The mortgage deed purported to convey to *Mary Fielding*, the eldest daughter of *Henry Fielding*, as the executrix of her mother, who was then dead, "all the messuages, tenements, dwelling-houses, lands and buildings thereinbefore mentioned, and also all that and those the steam-engines, mill geering, heavy geer, millwright work fixed, machinery and other matters and things erected and then standing and being in or upon the said thereby granted and demised buildings, works and premises, which in any manner constitute fixtures and appendages to the freehold of the same or any part thereof." The water wheels and steam engines, with the shafts immediately connected with the latter, have not been removed; and we are of opinion that, according to that part of the mortgage deed just now read, the parties intended

(a) 3 East, 43, 44.

that only that part of the machinery should be included and pass by the mortgage deed, which from the circumstances became part of the freehold ; and therefore that it did not include the machinery in question. The machinery belonged to the partnership, as they had the legal estate in it. With respect to the mortgage deed, that was executed, not by the partners generally, but only by that portion of them who had the legal estate in the buildings and lands. It is further to be considered, that shortly after this mortgage was executed the partners fell into difficulties, and it became necessary that they should state their property to their creditors. On that occasion they stated the buildings and lands as being subject to this mortgage, but placed the machinery under a different head, representing it as part of the partnership estate and free from any charge. The plaintiff, the husband of the mortgagee, a professional man, was present when that statement was reported ; he made no objection to it as to the point now raised by him. But that is not all, for upon a subsequent occasion an accountant waited upon him and presented it to him again. On that occasion he took time to consider it, made no objection to it, and afterwards signed the composition deed. Under all these circumstances it appears to us that there is sufficient to satisfy the terms of the mortgage deed without including the machinery in question, and that it neither passed, nor was intended to pass, by that deed. Then if it did not so pass, it is to be looked upon as personal estate, separate from the property mortgaged, and therefore as belonging to the assignees. We think that a nonsuit should be entered.

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Nonsuit entered accordingly.

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DENTON *against* RICHMOND.

The plaintiff granted to the defendant a lease, which after stipulating that not more than one third of the land should be in cropping in any one year, reserved a yearly rent of 50*l.* and also a further yearly rent of 5*l.* for every acre ploughed up or continued in tillage contrary to the lease. A declaration in covenant alleged that defendant in one particular year cropped more than one third of the land demised; and sought to recover half-a-year's additional rent. Pleas, first, that the plaintiff with a full knowledge of the breaches and of all the matters alleged in the declaration relating thereto, accepted from the defendant 25*l.* as and for all the rent due up to a certain day named, without demanding payment of such penalty or additional rent, and thereby waived his right to receive or recover the same. Secondly, that plaintiff, with full knowledge of the breaches &c., waived all claim or right on his part to receive any such penalty, &c.: Held, that the pleas, whether considered as pleas of tender or of accord and satisfaction, were bad on general demurrer; and that the right of the plaintiff to recover the additional rent by way of stipulated damages, was not waived or discharged by any matter stated therein.

COVENANT on an indenture of lease, dated 26th *February*, 1825, between the plaintiff of the one part, and the defendant of the other part, by which the plaintiff demised certain premises and buildings, with 77 acres of arable, meadow, and pasture land in the indenture described. To have and to hold the same from 11th *October* then last past for ten-years, with liberty for the defendant, his executors, administrators and assigns, to plough, till, and crop all the said land in such manner as he should think proper for the first seven years of the said term thereby demised, and liberty for him the said defendant, his executors, &c., for the remainder of the said term, to plough, till, and crop the said lands in such way as he might think proper, at a yearly rent of 50*l.*; but with a reservation that not more than one third of the said land, or as nearly one third as the different sizes of the closes would admit, should be in cropping in any one year, at a yearly rent of 50*l.*, and also yielding and paying over and beyond the aforesaid reserved rent unto the said plaintiff, his heirs and assigns, the further yearly rent or sum of 5*l.* of like lawful money for every acre, and so in proportion for a greater or lesser quantity than an acre of any part of the said premises which the said defendant, his executors, &c., should at any time or times during the said term, plough, crop, break up, or convert into or continue in tillage, or manage otherwise than according to the

accepted from the defendant 25*l.* as and for all the rent due up to a certain day named, without demanding payment of such penalty or additional rent, and thereby waived his right to receive or recover the same. Secondly, that plaintiff, with full knowledge of the breaches &c., waived all claim or right on his part to receive any such penalty, &c.: Held, that the pleas, whether considered as pleas of tender or of accord and satisfaction, were bad on general demurrer; and that the right of the plaintiff to recover the additional rent by way of stipulated damages, was not waived or discharged by any matter stated therein.

liberties and reservations in the indenture contained, without the consent of the said plaintiff, his heirs or assigns, first had or obtained in writing for that purpose, such increased rent and payment (if any should become due and payable) to be paid at the first of the before-mentioned half-yearly days of payment which should happen after such ploughing, cropping, &c., contrary to the liberties and reservations in the lease, and should continue payable during such parts of the remainder of the said term as the same should continue to be so cropped, ploughed, or converted into or continued in pillage contrary as aforesaid. Covenant by defendant to pay to the plaintiff the said yearly rent of 50*l.*, and also the increased rent (if any should become due and payable) at the times and in the manner aforesaid.

The first breach stated, that after the making the said indenture, and during the said term thereby granted, and after the expiration of the first seven years thereof, and whilst the defendant was possessed of the demised premises with the appurtenances, he, without the consent in writing of the plaintiff first obtained, in one and the same year, that is to say, in the year between the 20th *October* 1831, and the 20th *October* 1832, and before the 6th *April* 1832, to wit, on 1st *February* 1832, did plough, crop, and break up above, beyond, and considerably more than one third of the said land by the said indenture demised, and above one third thereof, calculated as nearly as the different sizes of the closes would admit of, to wit, 30 acres above &c., one third of the said land so demised as aforesaid, contrary to the liberties and reservations in the indenture. By means whereof the defendant, according to the form and effect of the indenture and of his covenants so by him made, became liable to pay to the said plaintiff on 6th *April* 1832, being the first of the before-mentioned half-yearly

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days of payment which happened after the ploughing, cropping, and breaking up of the land aforesaid, a certain large sum of money, to wit, the sum of 75*l.*, being one half-yearly payment of additional rent for and in respect of the said thirty acres, above, beyond, and more than one third of the said land demised, so ploughed, cropped, and broken up as aforesaid, calculated at and after the rate of 5*l.* per annum for every such acre.

Second breach, that the defendant kept and continued cropped and in tillage in one and the same year, above, beyond, and considerably more than one third of the land demised.

Pleas; first, as to so much of the declaration as relates to the supposed breaches of covenant firstly and secondly assigned, that after the committing of the said supposed breaches of covenant and of all the matters and things in the said declaration alleged, so far as the same relates to the said supposed breaches, and before the exhibiting of the bill, to wit, on 2d *November* 1832, the plaintiff, with a full knowledge of the said supposed breaches of covenant and of all the said matters and things in the said declaration, so far as it relates to those breaches respectively mentioned and alleged, accepted and received of and from the said defendant the sum of 25*l.* as and for all the rent due for or in respect of the said premises up to and inclusive of 11th *October* 1832, without demanding or requiring the payment of such penalty or additional rent as in the first and second breaches mentioned or any part thereof; and thereby then and there waived, gave up, and dispensed with his right to receive or recover any nomine pœnæ or penalty, or such additional rent as in those breaches mentioned as aforesaid, or any part thereof. Verification. Second plea to the same breaches, that after the committing of the said supposed breaches

of covenant, and of all the said several matters and things in the said declaration alleged, so far as it relates to those breaches, and before the exhibiting of the bill, to wit, on 2 Nov. 1832, the plaintiff waived, gave up, and dispensed with all claim or right on his part to receive, recover, or be paid any such penalty nomine pœnæ, or additional rent, as in those breaches respectively mentioned, or any part thereof.

Four other pleas traversed the breaches in the declaration. General demurrer to the first and second pleas. Joinder.

The points marked for argument by the plaintiff were, first, that the increased rent reserved by the indenture of lease declared on, was not to be considered as a penalty in the event there stated; and, secondly, that the plaintiff did not, by accepting the rent originally and expressly reserved, abandon his right to sue for any increased rent.

Channell in support of the demurrer. The first plea is the least objectionable, but it admits the breaches, and is bad as a plea of tender (a). Nor is it good as a plea of accord and satisfaction, partly because it does not answer the whole declaration, *Thomas v. Eaton* (b), and partly because it discloses no legal matter to show that the plaintiff has waived his right to recover on the breaches to which it is applied. Nor is that varied by the fact that if judgment had gone by default inquiry might have been had as to the amount of additional rent due and payable for each acre overcropped. Nor can the plea be supported by construing the additional rent to be in the nature of a penalty, a forfeiture of which had been incurred, and might be waived by the plaintiff. The additional rent is not a penalty; for, in a court of law, the precise amount of

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(a) See *Johnson v. Clay*, 7 Taunt. 486.

(b) 2 B. & Cr. 477.

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it must be recovered as stipulated damages, i. e. a liquidated satisfaction fixed and agreed on between the parties; and a court of equity will not relieve, *Rolfe v. Peterson* (a). There a bill in equity had been filed by a defendant praying relief from a similar covenant on payment of the actual damages assessed, and insisting on not being liable to pay the whole damages, to which Lord Camden acceded; but his holding was overruled in the House of Lords. [Lord Lyndhurst. The same thing was also decided in *Aylet v. Dodd* (b), and again in *Jones v. Green* (c)]. Lord Hardwicke said, that where there is a clause of nomine pœnæ in a lease to a tenant to prevent his breaking up and ploughing old pasture land, the whole nomine pœnæ shall be paid, for the intention of the clause is to give the landlord some compensation for the damage he has sustained from the nature of his land being altered. In *Benyon v. Gibson* (d) Lord Hardwicke again said, that a nomine pœnæ in leases to prevent a tenant from ploughing is the stated damages between the parties. In *Lowe v. Peers* (e) Lord Mansfield lays down that there is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee may either recover the penalty in debt (after which he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole), or he may proceed on the covenant, and recover more or less than the penalty toties quoties. He then says, "and upon this distinction courts of equity proceed. They will relieve against a penalty on a compensation, but where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man, nor is there any room for compensation or relief. As in leases containing a covenant against ploughing up

(a) 2 Brown's P. C. 436; 6 id. 417.

(b) 2 Atkyns, 239.

(c) 3 Y. & J. 298, equity side of Exchequer.

(d) 3 Atk. 306.

(e) 4 Burr. 2229.

meadow, if the covenant be not to plough, and there be a penalty, a court of equity will relieve against the penalty, but if it is worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative or room for relief against it, nor any compensation; it is the substance of the agreement."

In *Farrant v. Olmuis* (a) the lease reserved an increased rent for every acre of certain lands converted into tillage, and the jury gave a verdict for a smaller sum, viz. the actual damage done by such a conversion. But the court held that that verdict being for arbitrary damages only, while the contract was express for stipulated damages, it must be set aside. The same objections apply more strongly to the second plea.

F. Kelly contra. The plaintiff might be entitled to the entire sum of 5*l.* for every acre ploughed up, if the mere amount of the rent was in issue; for though in contracts *not* under seal it is still much doubted whether juries can find more than the actual damages sustained, yet in contracts under seal a man is entitled to the sum which the parties have fixed as payable in a particular event. But this may be considered as an amount of additional rent, which the landlord may forego by his act, and so waive his right to it. That depends on the language of this plea, "that the plaintiff accepted and received 25*l.* from the defendant as and for all the rent due for or in respect of the premises to a day named, without demanding payment of such additional rent. This being an action of covenant for recovering of damages, a verdict and judgment for the plaintiff could only be for damages, and not in the nature of a debt or specific sum; then this plea amounts in substance to a plea of satisfaction, and, at all events, can only be objected to for informality on

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special demurrer. The plaintiff being entitled to two sums quâ rent, receives 25*l.* for rent. Is not that a satisfaction of both sums?

Lord LYNTHURST C. B.—As I read these pleas, the matter alleged in them cannot even by construction amount to satisfaction, as has been argued. The words of the first plea are, that the plaintiff accepted and received 25*l.* from the defendant, as and for all the rent due for or in respect of the premises, up to and inclusive of a day named, without demanding payment of such additional rent; he is not even alleged to have received any thing in satisfaction of the additional rent; what he received was the original rent only. The plea, after referring to so much of the declaration as relates to the breaches of covenant, and to the terms of that covenant, distinguishes between the original and additional rent, by saying, that the plaintiff accepted from the defendant 25*l.* as and for all the rent due for the premises, up to and inclusive of a stated day. That was the original rent reserved by the lease; how, therefore, can that be relied on as having been accepted in satisfaction of the larger sum due as additional rent? The first plea is in terms the same as the second, and rests on the mere waiver by the plaintiff of the additional rent reserved. Now were it a forfeiture, it might be waived by the act of the plaintiff; but if damages had accrued, or were continuing, can they be waived by the circumstance here pleaded? The plaintiff had a right to recover the amount of additional rent from the defendant, which right the plea states to have been given up by matter in pais. That does not amount to a discharge. I am of that opinion on both points.

Judgment for the plaintiff, with leave to defendant to amend on payment of costs and pleading instant.

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IN THE EXCHEQUER CHAMBER.

WOLVERIDGE *against* STEWARD.

(In Error from the Court of Common Pleas.)

Before DENMAN C. J. of K. B.—Lord LYNTHURST
C. B.—LITLEDALE, PARKE, and TAUNTON, Justices
of K. B.—BAYLEY, VAUGHAN, and BOLLAND, Barons.

COVENANT. The plaintiff declared that in 1819 one *John Easthope* by indenture demised certain premises to the plaintiff for 21 years from *March 25, 1820*, yielding and paying certain rent, which the plaintiff also expressly covenanted to pay; that the plaintiff entered; and by an indenture of the *22 May 1821*, sealed with the seals of the plaintiff and defendant, and indorsed on the indenture of lease from *Easthope* to the plaintiff, the plaintiff, for and in consideration of a certain sum of money, to wit, the sum of *65*l.** to him paid by the defendant, bargained, sold, assigned, transferred, and set over to the defendant, his executors, administrators and assigns, as well the said indenture of lease as also all and singular the premises, with the appurtenances, demised by the said indenture of lease, or expressed or intended so to be, and all the estate, right, title, interest, term of years then to come and unexpired, property, possession, claim, and demand whatsoever, either at law or in equity, of him the plaintiff, of and unto the said premises, by virtue of the said indenture of lease, or otherwise howsoever, to have and to hold the said lease, together with the said premises by the same demised, or intended so to be, and by the said assignment assigned unto the defendant, his executors, administrators or assigns, from the *28 May*

Where a lessee, who has covenanted to pay rent, assigned his term by indenture indorsed on his lease, "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease," Held, that he could not recover in covenant against his assignee, for rent which became due after assignment over by the latter; though the lessee had been called on to pay the same to the lessor, under the covenant in the lease.

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then instant, for and during all the rest, residue, and remainder of the said term of 21 years granted by the said indenture of lease, then to come and unexpired, subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the said indenture of lease; and he the said defendant then and there accepted the said assignment, and by virtue thereof he the said defendant afterwards, and during the said term granted by the said indenture of lease, to wit, on &c. entered into and upon all and singular the said demised and assigned premises with the appurtenances, and became and was possessed thereof for the residue and remainder then to come and unexpired of the said term of 21 years, granted by the said indenture of lease, subject to the payment of the rent and performance of the covenants reserved and contained in the said indenture of lease: and although the plaintiff had always observed, performed, and fulfilled all things in the said indenture of lease, and in the said indenture of assignment contained on his part and behalf to be observed and fulfilled, he the plaintiff in fact said, that the defendant did not nor would after the said assignment, and during so much of the residue and remainder of the said term of 21 years granted by the said indenture of lease, as had elapsed since the said assignment, and since he the defendant became possessed of the said demised premises with the appurtenances by virtue thereof, well and truly, or in any manner, pay or cause to be paid the said rent reserved and made payable by the said indenture of lease, and according to the true intent and meaning of the said indenture of assignment, and which he therefore covenanted to pay, and ought to have paid as aforesaid, but, on the contrary, wholly neglected, omitted, and refused to pay divers large

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sums of the rent aforesaid, to wit, the sum of 5*l.* 5*s.* of the rent aforesaid, which became due and payable under and by virtue of the said indenture of lease, and the said covenant of the plaintiff in that behalf therein contained, for one quarter of a year of the said term ending on the 25th day of *March* 1831 &c. By reason and in consequence whereof the plaintiff, as the original lessee of the said premises with the appurtenances so demised and assigned as aforesaid, was called upon and required to pay, and was forced and obliged to pay, and had paid the said several sums to the said *John Easthope*, who was then lawfully entitled to and had good, legal, and sufficient right, title, power, and authority to demand, recover, and receive the same, to wit, at &c.

The defendant pleaded, that before the said several sums for the rent aforesaid in the said declaration mentioned, or either of them, became due and payable as in the said declaration above alleged, to wit, on the 4th day of *November* 1822, by a certain indenture then and there made between the said defendant of the one part, and one *G. C. Foley* of the other part, the said defendant duly assigned the said demised premises and all his estate and interest therein, to the said *G. C. Foley*, his executors, administrators, and assigns, to have and to hold the same, to wit, from the day and year last aforesaid, for the remainder of the said term; by virtue of which said assignment the said *G. C. Foley* afterwards, and before the said several sums or either of them became due and payable, to wit, on &c., entered and became possessed of the said demised premises, and of all his the said defendant's estate and interest therein, and that the defendant was ready to verify &c.

Demurrer and joinder.

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The court of C. P. gave judgment for the plaintiff below.

The errors now assigned were, first, that the declaration and matters therein contained were not sufficient in law for maintaining the action; secondly, the common error; thirdly, that by the record it appeared that the defendant below was liable to the plaintiff below, on a covenant implied in law from the language of the second mentioned indenture.

Charles Turner for the assignee, who was defendant below, and plaintiff in error (a). The plaintiff, lessee of *Easthope*, assigned the remainder of his term to the defendant, subject to payment of the rent and performance of the covenants in the lease. The defendant assigned to *Foley*. Rent having become in arrear after that assignment, the plaintiff was obliged to pay the amount to *Easthope* his lessor (b); and the question is, Whether he, as lessee, can recover from his assignee rent which accrued due after the latter had parted with his estate and interest in the demised premises?

Now, unless some words of the assignment amount to an express covenant by the assignee to pay rent and perform the covenants in the lease, during the whole unexpired residue of the term, or to indemnify the assignor against them, the assignee ceased to be liable for breaches of those covenants when he assigned over his term; *Taylor v. Shum and Others* (c), *Odell v.*

(a) To avoid unnecessary confusion, the plaintiff in error is called the defendant, and the defendant in error the plaintiff, throughout this report.

(b) See *Bachelour v. Gage*, *Executor of Gage*, Cro. Car. 188, Sir W. Jones, 223, S. C.; *Walker's case*, 3 Co. 23 a., Bac. Ab. tit. Covenant, E. 4; *Staines v. Morris*, 1 Ves. & B. 11; *Auriol v. Mills*, in error, 4 T. R. 98; Cro. Jac. 309, *Barnard v. Godscall*.

(c) 1 B. & P. 21. So though the assignee is a beggar, *Pitcher v. Tovey*, 1 Salk. 81. S. C. 4 Mod. 71, 1 Show. 340, *Ld. Ray.* 368, *Carth.* 177,

Wake and Another (a), Valliant v. Dodemede and Others (b). Now there is no distinct or independent covenant by the defendant to pay the rent or perform the covenants. There is an express covenant to do so, created by the words of the assignment, "subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the said indenture of lease." If those words import a covenant at all, they at most import only an implied covenant or a covenant in law, which only arises where there is privity of estate between the parties, *Thursby v. Plant (c), Bachelour v. Gage, Executor of Gage (d), Swan v. Stransham (e).* Such a privity could never have existed in this case, between the plaintiff and defendant, for before the assignment by the former the defendant had no estate in the premises, nor after that event had the plaintiff any; and a privity of estate then commenced between the lessor and the defendant as assignee. But the covenant by the assignee must be express, in order to charge him after parting with the possession, and the situation of the words relied on in the habendum of the assignment is material to the ascertaining whether it is express or not.

The office of the habendum is stated in *Vin. Abr. tit. Grants (I. a.)* to be to limit the estate, so that the general implication of the estate which will pass by con-

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2 Ventris, 234; *Lekoux v. Nash*, Stra. 1221; *Walker v. Reeves*, Doug. 461 n., Bull. N. P. 159. Nor is it otherwise in equity, *Valliant v. Dodemede*, 2 Atk. 546. 1 Fonbl. Tr. Equity, 5 ed. 359 n.; and *Philpot v. Hoare*, 2 Atk. 219. Ambler, 480, S. C. *Goddart v. Keate*, 1 Vern. 87, for the assignees liability is only in respect of his possession. *Boulton v. Canon*, 1 Freem. R. 336; and see Bac. Abr. tit. Covenant, E. 4.

(a) 3 Campb. 394.

(b) 2 Atk. 546.

(c) 1 Wms. Saund. 241 b. and note 6.

(d) Cro. Car. 188, Sir W. Jones, 223, S. C.; and see 1 Sid. 447.

(e) Dyer's R. 257 a.

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struction of law by the premises, is always controlled and qualified thereby. So in *Co. Lit.* 183 *a*, it is said, "If in the premises lands be letten, or a rent granted, the general intendment is, that an estate for life passeth, but if the habendum limit the same for years or at will, the habendum doth qualify the general intendment of the premises; and the reason of this, for that it is a maxim of law that every man's grant shall be taken by construction of law most forcible against himself—which is so to be understood that no wrong be thereby done." If those words of grant are those of the grantor, so are those of the habendum; and the words in question are only used as words not of covenant, but only qualifying what has preceded, and denoting that the assignor did not intend to grant an estate free from the incumbrances annexed to it by the original lessor. Suppose *A.* seised in fee to mortgage to *B.* in fee, and afterwards to sell the equity of redemption or re-mortgage the same premises to *C.*, the habendum in the conveyance to *C.* would be to *C.* and his heirs, "subject nevertheless to the mortgage to *B.*," but it would be against all the authorities to hold that a covenant would be created by these words, compelling *C.* in favour of *A.* to pay off the first mortgage to *B.* Another case may be put of *A.* assigning a lease to *B.* by way of mortgage, subject to the rent reserved in the lease; but if that made it imperative on the mortgagee to pay the rent during the lease, and be liable to suit by the mortgagor in covenant for such rent as he might in future pay to his lessor, it would defeat the object of the transaction.

Though any words in a deed, which show an agreement to do a thing, make a covenant (*a*), the intention of the parties; that it should operate as an agreement, must appear; for if an intention appears that they should

(*a*) Com. Dig. Covenant, (A. 2.) Sel. N. P. tit. Covenant.

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operate as a qualification only, they will not be construed to operate as a covenant. *Rolle's Abridgement*, tit. Covenant, C. pl. 52 and 53, elucidates this: "If lessee for years covenants to repair—provided always *and it is agreed* that the lessor shall find great timber, &c. this shall make a covenant on the part of the lessor to find great timber by the word *agreed*, and shall not be a qualification of the covenant by the lessee; but if the lessee covenant to repair, provided always that the lessor shall find great timber, without the word *agreed*, this proviso shall not be any covenant on the part of the lessor, but shall only be a qualification of the covenant of the lessee." Then a covenant ought not to be inferred from equivocal terms which may have been used in another sense. In *Staines v. Morris* (a), the bill was filed in order to obtain the insertion of an express covenant for indemnifying the assignors of a lease against the performance of the covenants in the lease for the remainder of the term. There the original demise was to *Clarke*, who assigned to *Staines* for the remainder of the term, subject to the future rents and covenants. The lease was put up for sale by the executors of *Staines*, with notice that they would not covenant for the title, and was sold to the defendant. The executors afterwards agreed to a covenant for quiet enjoyment, free from incumbrances by themselves or Sir *W. Staines*, but insisted on an express covenant by the defendant to them to pay the future rent and perform the covenants of the lease during the remainder of the term. The master's opinion was against the right so claimed; but Lord *Eldon* having allowed an exception to the report, decided that assignors were entitled to require such a covenant in order to indemnify themselves against the payment of the rent and performance of the covenants; and said that there was

(a) 1 Ves. & B. 2.

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no distinction between the cases of assignment by the original lessee and by an assignee of that lessee, the propriety of enforcing that covenant being as manifest in the case of the assignee, that he may be indemnified in respect of his parting with the possession out of which the duty to pay the rent accrues, independent of actual covenant, as in the case of assignment by the original lessee. He put this case: "Suppose, instead of an assignment actually executed by *Clarke* the original lessee, to Sir *W. Staines*, the question had accrued on an agreement between them for the purchase and assignment of the term, and a bill filed for the execution of that agreement;" and afterwards added, "If, therefore, this stood upon an agreement, the proper execution of such an agreement would be an assignment by *Clarke* covenanting for the title, and Sir *W. Staines* entering on the other hand into those covenants implied and expressed, which are intended on his part to be executed, where they are both expressed and implied; an assignment not only *subject* to payment of rent and performance of the covenants, but the instrument executed and accepted by him, containing an express covenant to pay the rent and perform the covenants." Then had the words contained in the assignment to Sir *W. Staines* operated on Lord *Eldon's* opinion as an express covenant, he would have dismissed the bill as an idle seeking of an object already attained. *Burnett v. Lynch* (a), only shows that where a lessee assigns a lease subject to payment of rent and performance of covenants therein, he may sue his assignee in tort for neglecting to perform those covenants *during the time he continued assignee*, whereby the lessee sustained damage. *Bayley J.* said, "There is a duty from the defendant (assignee) to the plaintiffs (executors of assignor) implied from the very nature

(a) 5 B. & Cr. 589. See *Campbell v. Lewis*, in error, 3 B. & Ald. 392.

and state of things which existed between the parties. That duty appears to me to be very accurately stated in the declaration, where it is described as commensurate with the time during which the assignee had an interest in the premises." The assignee's duty in that case arose from his acceptance of the assignment, and in respect of his possession under it—a doctrine not here disputed. 2dly. The plaintiff should have stated the covenant on which he relied; whereas he has left it to the court to discover or infer it from the whole declaration.

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Bompas Serjt. contrà, for the lessor, who was plaintiff below and defendant in error. The words in question are not a part of the habendum, and are more analogous to those of the reddendum, "yielding and paying." But this assignment being *inter partes*, these words are not the words of the assignor qualifying the habendum or of the assignee, but of both parties; though if any undertaking by either party to do any thing can be gathered from them, they are especially his words. The liability here sought to be established is said to coexist only with the continuance of the privity of estate between the plaintiff and defendant, which is argued to be at an end. But the privity of contract on which the plaintiff relies was not determined by the distinction of the privity of estate. *Blackstone's Commentaries* (a) elucidate the terms "express" and "implied" covenants, which have been mentioned. "*Express* contracts are when the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which the law presumes that every man undertakes to perform." The

(a) 2 Bla. C. 443.

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difference then is, that an express contract is to be gathered from the meaning of the words, and an implied contract from the situation and intent of the parties to the assignment. *Newton v. Osborn* (a) shows that the words "yielding and paying" make an express covenant, for they express the agreement of the lessor and lessee. *Harper v. Burgh* (b) was an action for rent by the assignee of the reversion against the assignee of the term, under an assignment containing a *reddendum* of rent. Plea, that lessor released all the covenants to the defendant before the rent became due, without denying that the release was after the assignment; and the plaintiff had judgment; for the court intended the action to be grounded on the *reddendum*, which is a covenant in law, running with the reversion at common law before 38 H. 8. c. 34., and passing by the grant of the reversion, so that the lessor could not release it after having assigned. The words of the deed of assignment in this case meant that the assignee should hold during the term, and be subject to payment of rent during the same period; and the assignee, by executing the deed, admits those to be the terms on which he consents to take the premises. They thereupon constitute an express covenant. *Barnett v. Lynch* strongly supports that position; for had that assignment been, not by deed-poll signed by the assignor only, but by deed inter partes, as in this case, it must have operated as an express covenant upon which an action of covenant might have been sustained. Thus *Holroyd J.* said, "What is the effect of the assignment? The assignee, by virtue of it, stands in the situation of the lessee, and becomes bound to pay

(a) *Style's R.* 387. And see 1 Roll. Abr. 519, pl. 10; 1 Sid. 266, 447; 3 T. R. 402; 1 Saund. 241, b. n. (5); 1 Levinz, 232, n. (1), 259 Carth. 135; 9 Ves. 330; 1 T. R. 95.

(b) 2 Lev. 206; S. C. 2 Jo. 102.

the rent and perform the covenants. By accepting the assignment he states that he is subject to the rent and the performance of the covenants." *Littledale J.* after pointing out that a lessee, if ousted during the term, may sue the lessor in covenant on the word "demise" in the lease, says, "The word 'assign' in this deed-poll does not import any covenant or contract on the part of the assignee, but is a mere description of the interest conveyed. It is true that the lessee does not assign the term generally, but assigns it subject to the payment of the rent and performance of the covenants. The assignment being by deed-poll does not, however, contain any contract on the part of the assignee; and in order to enable the assignor to maintain covenant against the assignee, there must be a contract under seal by the latter." Lord *Tenterden* also says, "Here the defendant has not engaged by deed to perform the covenants, consequently covenant will not lie." Here the defendant has executed a deed, by which his agreement to pay the rent during the term sufficiently appears (a) to constitute an express covenant to that effect; for a covenant is merely an agreement under seal. Though *Staines v. Morris* shows that a court of equity will direct such a covenant for indemnity to be inserted in an assignment as would prevent this question arising, yet if it does arise, then by equity the assignee takes, subject to incumbrances. *Chancellor v. Poole* (b) was in covenant for rent by the original lessor against the sole assignee of the term. The assignment was a lease to *B.* for 21 years, containing a covenant for payment of rent. The declaration stated, that by deed-poll between the original lessee, the lessor, and the assignee, the lessee had, with consent of lessor, assigned the lease &c. to the defendant, he paying the rent and performing the covenants therein, and indem-

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(a) See Dougl. 766.

(b) Ibid. 764.

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nifying the lessee against them. The lessor also released the option of determining the lease, which he had reserved in the lease. The declaration stated the assignment. The plea was, that the defendant had assigned over to *B.*, who had entered before any part of the rent sued for became payable. Lord *Mansfield* said, the question was, whether the plaintiff was a contracting or merely an assenting party in the deed-poll; and added, that there was a covenant in it by the defendant for paying rent, *but it was with the lessee.* *Ashurst* and *Buller* Js. said, that the lessor had concluded himself, by stating in this declaration that the deed-poll was an *assignment*, and that if he had meant to avail himself of it as a contract between himself and the assignee, he should have stated it according to its legal operation, *viz.* as a *demise* to the assignee, without stating the first lease at all. The words of that deed-poll were not stronger than those in the indenture in this case, and were held to amount to a covenant, though following a participle. The words here relied on would not avail at all, if they were only to endure for privity of estate. As to the second point, the express averment that the defendant covenanted to pay the rent and perform the covenants is sufficient.

Turner in reply. *Chancellor v. Poole* is no authority on this point. The lessor there contended that the assignment by the original lessee, to which he was a party, for the reasons disclosed in the case, operated as a new lease from *him* to the assignee, and that the assignee expressly covenanted with *him* to pay the rent. The simple point there decided was, that the lessor could not maintain his action against the assignee upon a declaration as there framed. The dictum of Lord *Mansfield* is extra-judicial, and the words of the deed more extensive than in this case.

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DENMAN C. J. delivered the judgment of the court.—This case comes before the court on a writ of error from the court of Common Pleas. It is an action of covenant brought by the defendant in error on an indenture of assignment of a term for years. The declaration states the original lease from the lessor to the defendant in error, for 21 years, from *March 1820*, containing a covenant to pay rent quarterly; and that, by indenture executed by the plaintiff and defendant, the defendant in error assigned to the plaintiff in error, his executors &c., the said indenture of lease and the demised premises, and all the estate, right, title, and interest, term of years then to come and unexpired, property, claim, and demand of the defendant in error, by virtue of the said indenture of lease &c., therein; to have and to hold the said lease, together with the said premises by the same demised, and by the said assignment assigned to the plaintiff in error, his executors, administrators, and assigns, during all the rest and remainder of the said term of 21 years granted by the said indenture of lease then to come and unexpired: *Subject nevertheless to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the said indenture of lease*; and that the plaintiff in error accepted the said assignment and entered. The declaration then assigns as a breach the non-payment of rent due after the assignment, by reason whereof the defendant in error was obliged to pay the amount.

The plaintiff in error pleaded several pleas, on which issue was joined and found against him; and one plea, *viz.* that before the rent became due he assigned over; to which plea there was a demurrer and joinder; on which judgment was given by the court of Common Pleas for the defendant in error.

The question in this case is, whether the plaintiff in

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error is liable to the defendant in error for non-payment of rent due after he had assigned over: and that depends upon the further question, whether the words "subject nevertheless to the payment of the yearly rent," &c. amount to a covenant to pay the rent during the whole residue of the unexpired term. If they do, the judgment of the Court below ought to be affirmed; if they do not, it ought to be reversed. We are of opinion that they do not.

It is fully established that no precise form of words is necessary to constitute a covenant. "Any words in a deed which *show an agreement* to do a thing, make a covenant" (a); but it must be clear that they are meant to operate as *an agreement*, and not merely as words of condition or qualification (b). Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable?

To determine this we must look at the indenture as stated on the record, and observe in what part the words occur; they come after the habendum and constitute part of it;—though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself, and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended, and this is properly done in the habendum. Its office is to limit the certainty of the estate (c). "It doth qualify the general intendment of the premises;

(a) Com. Dig. Covenant (A 2).

(b) Id. (A 3). 1 Roll. Abr. 518, pl. 30 and 25.

(c) Co. Lit. 183 a.

and the reason of this is, for that it is a maxim of law that every man's grant shall be taken by construction of law most forcible against himself." (a). As these expressions, therefore, occur in that part of the deed in which they ought to be, if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only; and some instances were adduced by the learned counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification. For example, the assignment of a lease by way of mortgage, and the conveyance of an estate subject to a mortgage or incumbrance, to a second mortgagee or to a purchaser, where it is impossible that these words could constitute a covenant by the mortgagee to pay the rent in the one case, or by the second mortgagee or purchaser to pay off the mortgage or incumbrance in the other.

It may be said, however, that in these instances the context and subject-matter of the instrument lead to the inference that no covenant was intended by these words, but that in the present case no such inference arises; and that the same words in different instruments may have different meanings. This may be true; but it lies upon the defendant in error to show affirmatively that the words amount to an agreement with him to pay the rent and perform the covenants; and is there any thing in this indenture which tends to prove that they were meant to be used in any other sense than that which would naturally be attributed to them in the place in which they occur? On the contrary, if the assignor really intended that the assignee should covenant with him to pay the rent and perform

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(a) Co. Lit. 183 a. See also Hobart, 171, *Stukeley v. Butler*; Com. Dig. Faint (E 9).

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every covenant during the term, and thus become liable not only for his own defaults but for those of all subsequent assignees, and the assignee really intended also to bind himself to that extent, is it not to be expected that they would have expressed themselves in distinct, unambiguous language? especially as it is the usual practice in cases of this kind, where such a liability is intended, for the assignee to enter into a bond on an express covenant of indemnity with the assignor, against the covenant in the original lease. It was a very just remark made by the counsel for the plaintiff in error, that it is the duty of a party who intends to bind another by a covenant in a former formal instrument, to insert it in that instrument in distinct and intelligible terms, by which the party to be bound cannot be deceived, and not to call upon the court to infer such a covenant from words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other. For these reasons we think that the proper construction of this indenture is, that these are words of qualification and not of contract; and if the question were entirely new we should adopt that construction. We have, however, the authority of the court of King's Bench in a case which is not reported, the particulars of which have been furnished by my brother Mr. Justice *James Parke*, who was counsel in it, *Mills v. Harris, Michaelmas term 1820*. It was an action of assumpsit by the assignor against the assignee of a lease, who had accepted but not executed the assignment, for not repaying to the assignor the rent which he had been obliged to pay after the assignee had assigned over. The deed contained similar words to those in this instrument. The late Lord *Tenterden* nonsuited the plaintiff on the trial at the sittings before *Michaelmas term 1820*; and on a motion for a new trial the court

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confirmed his decision by refusing a rule, on the ground that these were not words of agreement, but were merely descriptive of the obligations to which the assignee would be liable as between him and the lessor.

It remains only to make some observations on the cases relied upon by the defendant in error. That of *Burnett v. Lynch* (a) proceeds upon the ground, that during the continuance of the interest of the assignee there is a duty on his part to pay the rent and perform the covenant. Bayley J. in giving judgment, states that the duty is commensurate with the time during which the assignee has an interest in the premises. This duty, we think, would arise from the mere relation between the parties, without any such words as those now under consideration; for the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who as between himself and the lessor is the principal, bound, whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety, after paying the debt or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee in respect of breaches committed during the continuance of the interest of each; for the lessee is in effect a surety for each of them to the lessor. The case of *Chancellor v. Poole* (b) was also mentioned, in which Lord Mansfield said, "that there was a covenant by the defendant for paying the rent in the deed-poll, but it was *with the lessee*." There, however, the words of the instrument were very different; they were these: "The assignee paying the rent and performing the covenants *and indemnifying the lessee against the same*:" which last words were incapable of being construed as qualifying the

(a) 5 B. & C. 589.

(b) Doug. 751.

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generality of the granting part, and could have no other effect than an agreement on the part of the assignee with the assignor. For these reasons we think that the judgment of the court of Common Pleas ought to be reversed.

Judgment reversed.

IN THE EXCHEQUER OF PLEAS.

ROGERS *against* LANGFORD (a).

On the 23d Nov. country bank-notes were paid by A., a purchaser of goods, to B. the vendor. On the 28th B. requested the purchaser's shopman as a favour to exchange the notes for money, and received the amount accordingly. The bank, which was situated at a considerable distance from the place where the

SPECIAL assumpsit on the warranty of country bank-notes, with the money counts, and a plea of non assumpsit, tried before Lord *Lyndhurst* C. B. at the summer assizes for *Montgomeryshire* 1832. The facts were, that on *Wednesday 23 November* the plaintiff, a shopkeeper at *Welchpool*, gave the defendant at *Oswestry* market five 5l. notes of the *Mold* bank, then in good credit, for barley bought of the defendant. At about four in the afternoon of the following *Monday*, the 28th, the defendant called at the plaintiff's shop at *Pool*, and asked his shopman (a witness) to change five notes, which he said he had had from the plaintiff the *Wednesday* before, saying, they were *Mold* notes, and had been refused to be changed

(a) This case was argued and determined in *Hilary* term 1833.

shopman gave the money, had stopped payment two hours before. A. the purchaser, heard of it on the 29th, and on the 30th wrote to B. to inform him of the event, and that he, B., was to be liable for the notes; but did not tender them to him then or for some days after, nor were they ever presented at the bank. Held, that A. should have returned them to B. without delay, or presented them at the bank as holder: and that having done neither, he could not recover the amount from B.

because not payable in *London*. The shopman changed them as requested with money out of the plaintiff's till merely to oblige the defendant, and not otherwise, knowing that he had received them from the plaintiff. About two o'clock on that same day (a) the *Mold* bankers had stopped payment, and afterwards became bankrupts. The witness and the plaintiff were informed of this event at night on *Tuesday* the 29th, and on the 30th wrote to the defendant to inform him that the *Mold* bank stopped on *Monday*, and that the defendant must be liable for the notes. No answer being returned, the witness was sent by the plaintiff to the defendant on the 5th *December*, and tendered him the notes, but he refused to receive them. The following admissions were made: that a mail left *Mold* at eight every evening, arrived at *Oswestry* at three, and at *Welchpool* at four the next afternoon; that a mail left *Welchpool* every morning at seven, and *Oswestry* every morning at ten, which arrived at *Mold* at eight the following morning. The notes not being produced at the trial, pursuant to notice, the defendant's counsel objected that they should have been so produced, because the defendant, if liable to pay the amount on account of warranty of them, was entitled to have them delivered up. It was then proved that they had been afterwards given in a cover to the defendant's wife while in an open field near her house, and that on her seeing what they were, she threw them down there, and did not take them up again (b). Verdict for the defendant.

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(a) As to the fact that the notes were paid over after the bank had stopped, see *Reaching v. Garner*, Holt's C. N. P. 313, as relied on in *Camidge v. Allenby*, 6 B. & C. 381, 383.

(b) This point was mentioned on showing cause, but the court gave no decision on it; they appeared to intimate that the evidence had superseded it.

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A rule for a new trial having been obtained, on the ground that the verdict was against the evidence,

J. Jervis showed cause for the defendant. [Lord *Lyndhurst* C.B. The defendant had these notes in his possession from *Wednesday* till *Monday*, a time sufficient for him to have obtained payment of them, but did not get them changed till after the bank had actually stopped.] They were not presented for payment in due time, or returned to the defendant by the next post after the plaintiff had notice of the failure of the bank. [Lord *Lyndhurst* C.B. That objection was not taken at the trial.] It is an answer to this rule; but even had the defendant indorsed the notes, he could not have been sued without their being produced to him, so as to give him a remedy against the bankers, who, as makers, stand in the situation of the acceptors of a bill. That was so held, even in the case of a check drawn on a banker, who became bankrupt before, after being long overdue, it was presented for payment, *Bevan v. Hill* (a). In *Hansard v. Robinson* (b) the bill was lost; and it was held, that the indorsee could not recover against the acceptor, without producing and offering to deliver up the bill, though it was lost after due, and the indorsee offered an indemnity. *Esdaile v. Sowerby* (c) is a distinct authority that presentment must be made to the party primarily liable on a bill, in order to charge parties who are only secondarily liable, even though the latter may know aliunde that the drawer and acceptor are bankrupt or insolvent. In *Bowes v. Howe* (d) the mere shutting up and aban-

(a) 2 Camp. 381.

(b) 7 B. & Cr. 90.

(c) 11 East, 114. See *Rashton v. Aspinall*, Doug. 679.(d) In error, 5 Taunt. 30, reversing *Howe v. Bowes*, 16 East, 112; and see *Russell v. Langstaffe*, Doug. 514; *Rhode v. Proctor*, 4 B. & C. 517.

doning their shop by the insolvent makers of a country bank-note payable on demand at a certain place, was held not to dispense with a presentment of the note and demand of payment, these being made in fact and alleged in pleading. But *Camidge v. Allenby* (a) is decisive. There, at three o'clock on the 10th *December*, notes of the *Huddersfield* bank were paid by the defendant to the plaintiff for corn sold and delivered at *York*. *Huddersfield* is forty miles from *York*, and fifty-four miles from the plaintiff's residence. At eleven o'clock that morning the bank had stopped their payments, and never resumed them; but neither party knew of its stoppage or insolvency. The vendor never presented the notes at the bank for payment, but on 17th *December* called on the vendee to take them back and pay the amount. It was held, that the defendant was justified in refusing both requests, the vendor having made the notes his own by laches, so that they therefore operated as satisfaction for the debt. *Little-dale J.* there says, that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker is solvent at the time when it is so passed; and *Holroyd J.* was of opinion, that the notes being paid, and received as money, and both the parties being innocent, and the notes being what they imported to be, they must operate as payment, thus recognizing *Miller v. Race* (b). There is no evidence here of any express promise to guarantee the solvency of the makers of these notes, and both parties are equally innocent.

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Lloyd for the plaintiff, in support of the rule. The only question in *Camidge v. Allenby* was, whether the

(a) 6 B. & Cress. 381.

(b) 1 Burr. 452.

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notes operated as payment; not whether the passing them by the purchaser to the seller raised an implied contract, that the makers were solvent at the time. The promise here implied is, that the notes are worth what they profess to be worth, and arises from their being exchanged by the plaintiff as a favour to the defendant, and at his request. [*Bayley B.* Can you contend it to have taken place as a favour? a seller who had taken notes from the buyer as money on the sale of his goods asked him afterwards to give him something else in lieu of them.] That was so urged at the trial, but the evidence was, that the notes were changed as a favour to the defendant.

As to the want of presentment, the plaintiff was not bound to present the notes at all, for that has only been held to be necessary where the notes are given in payment of a pre-existing debt. In *Camidge v. Allenby*, *Bayley J.* lays down the rule as to all negotiable instruments to be, that if they are taken in payment of a pre-existing debt, they operate as a discharge of it, unless the holder does all the law requires to be done in order to obtain payment of them. [*Bayley B.* Suppose instead of giving notice on the *Wednesday* the plaintiff had not given notice for a quarter of a year?] Such laches would have precluded his remedy. [*Bayley B.* The breach of warranty would have been the same. Lord *Lyndhurst C. B.* The notes were not returned promptly to the defendant, though they were offered to him some time after. The necessity of presentment imposed by the law merchant on the holder was dispensed with, under the circumstances, by the plaintiff's having exchanged these notes as a favour, and not getting the benefit of commission or discount, as in the ordinary course of trade; then both parties being innocent, the implied promise arose that the notes

were good. *Bayley* B. Did not the plaintiff, by giving money for these notes, impose on himself a necessity to present them for payment the next day? He had originally given the defendant these notes as money; then the favour of exchanging them was one which the defendant had a right to ask. Had the plaintiff been a holder in the ordinary way he must have sent the notes over to *Mold* on the *Tuesday*, or been clearly liable to the consequences of his laches. Is there any case distinguishing between a party taking notes for his own benefit or by way of discount, and a party not so taking them?] No, but all the cases turn on the securities being taken in the ordinary course of trade. No such laches here appear as to disturb the defendant in seeking his dividend, or asserting his rights on the notes, which when he took them were waste paper. [Lord *Lyndhurst* C. B. In this case the notes were received by the plaintiff as a payment or equivalent for money, while in *Camidge v. Allenby* they were received as payment or equivalent for goods. This defendant had all the time between *Wednesday* and *Monday* to circulate or present the notes.] The defendant took the notes in payment though not finally, and if he had presented them, as he should have done, he would have gained a benefit by having taken them as payment. Notice of the insolvency of the bank was here sent to the defendant in due time, after it was known to the plaintiff. That notice complied with one of the alternatives thus stated by *Bayley* J. in *Camidge v. Allenby* (a):—"It is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or maker of a note; for a party is

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(a) 6 Barn. & Cres. 382.

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not only entitled to knowledge of insolvency, but to notice that in consequence of it he will be called on to pay the amount of the bill or note (a)."

The Court gave time to consider the point of necessity for presentment, which had not been urged at the trial; and on another day *Henderson v. Appleton* (b) was cited for the plaintiff.

It was tried in the court of pleas at *Durham*. On motion for a new trial argued before *Bayley* and *Hullock* Js. at chambers in *Serjeant's Inn*, on 23 July 1827; the case appeared as follows:—Assumpsit for goods sold. Plaintiff sold goods to defendant at *Darlington* market on *Monday 12th December*, and on account of the alarm respecting bankers it was agreed that the payment should not be made till the *Monday* following (the 19th *December*), when the parties again met at *Darlington* market, and defendant tendered several country notes, and offered plaintiff the choice, and he selected and took two 5*l.* notes of *Hutchinson's Stockton Bank*, and in the evening went home to *Husworth*. By the course of the post the notes could not have been presented at the bank at *Stockton* till *Wednesday* the 21st *December*. It was proved that the bank paid all day on *Saturday* the 17th *December*, but did not pay on *Monday* the 19th or afterwards, and refused to pay any notes after *Saturday*. On *Wednesday* the 21st the plaintiff met the defendant at *Stockton*, and offered to return or exchange the notes with him, but he refused, saying that the bank was going (meaning paying) on *Tuesday*. Verdict for plaintiff. *Cresswell* for the defendant, in support of his rule for a new trial, contended that *Howe v. Bowes*, 5 Taunt. 30, esta-

(a) *Solarte and Others, Assignees, v. Palmer and Another*, 1 Tyr. R. 371.

(b) See Chitty jun. on Bills, with all the statutes and cases in full, 1320 note (a); also Chitty sen. on Bills, 7 ed. 638; 8 ed. 388, *notis*.

blished an obligation in all cases to present for payment, and referred to *Camidge v. Allenby*, 6 B. & C. 382, in which it was held, that though the defendant delivered the notes to the plaintiff after the bank stopped payment, yet inasmuch as the plaintiff kept the notes a week after knowledge of the failure of the bank, without offering them to the defendant, or giving him notice, he had made the notes his own. He relied also on the words of 3 & 4 Ann. c. 9. s. 7. and on the general rule requiring the presentment of a bill, although the acceptor has notoriously become bankrupt. *Chitty* contra for the plaintiff relied on *Howe v. Bowes*, 16 East, 112; 5 Taunt. 30, S. C.; *Owenson v. Morse*, 7 T. R. 64, and 10 Ves. 246, and insisted that as the defendant had himself delivered the notes to the plaintiff at a time when the bank had already stopped payment, he had broken the implied warranty, that the notes at the time of the delivery to the plaintiff were capable of producing the money, and that at least the defendant's subsequent conversation dispensed with the necessity for a formal presentment.

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BAYLEY J. said that he believed the ground of the decision in *Camidge v. Allenby* to be, that the notes should be deemed a payment, unless returned in a reasonable time; and that the plaintiff, by keeping them a week after he heard of the stoppage without notice to the defendant, had precluded himself from recovery, but that here the plaintiff had offered to return, and the defendant had refused to take back the notes, and therefore plaintiff was entitled to recover; and *Hullock B.* concurring, the rule for a new trial was discharged.

That case shows the ground of *Camidge v. Allenby*, and also that an offer to return the notes in a reasonable time is sufficient, without presentment at bankers

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who have stopped payment. A contrary rule would stop the circulation of country bank notes.

[Lord *Lyndhurst*. In *Henderson v. Appleton* the holder of country bank notes offered to return them to the party from whom he received them; and that offer was made on the day on which in course of post they might have been presented at the bank. Here no offer to return the notes was made on the *Wednesday*, but the letter merely stated that the defendant must take back the notes, and would be held liable for the amount. If the notes had been tendered to him on the *Wednesday* it would have been within *Henderson v. Appleton*].

It was afterwards ascertained that there had been no tender of the notes to the defendant till the 5th *Dec.*; and finally,

Per Curiam.—The notes ought either to have been presented by the holder to the *Mold* bank for payment, or else have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them or making the best of them, but as the point was not taken at the trial, the rule must be absolute for a new trial on payment of costs (a).

(a) It was not tried again.

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PEARCE *against* VINCENT and Others.

BY order of the Master of the Rolls the following case was stated for the opinion of this court.

Richard Pearce the testator, being at the date of his will hereinafter stated, and at the time of his decease seised in fee of certain freehold and copyhold estates in the counties of *Hertford* and *Leicester*, and at *Westminster*, and *Rushden*, in the county of *Northampton*, by will bearing date 30 March 1813, duly executed and attested, devised certain estates to be sold to pay debts and legacies, after bequeathing an annuity to be payable out of his freehold and copyhold estates not thereinbefore by him devised; and devised his manors of *Flamstead* and *Saint Agnell's*, in the county of *Hertford*, and manor of *Stanwick*, in the county of *Northampton*, with the quit rents and other appurte-

R. P. devised his real estates to his cousin *T. P.* for life, and after his decease devised as well his real and personal estate, as all accumulations thereof, to such of his the testator's relations of the name of *Pearce* "being a male," as the said *T. P.* should by deed or will give or nominate or appoint; and in default of such gift or appointment

by *T. P.*, testator devised the same to "such of his, the testator's relations, of the name of *Pearce*, being a male, as *A.* should approve of or adopt," if living at the decease of the said *T. P.*, his heirs, executors, administrators, and assigns for ever; and in case no such male relation should be so adopted, or such adopted male relation should not be living at *T. P.*'s decease, then testator devised the same "unto the next and nearest of kin of him the said testator, of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one, of equal degree, living at his the said testator's decease, his heirs, executors, administrators or assigns for ever." After this, testator gave to *T. P.* the presentation to a living to present to at all times during his life, and gave his plate, household goods, &c. to his executors, in trust to permit *T. P.* to have, use, and enjoy the same during his life, and after his decease, then "in trust for the persons who should succeed to or inherit his the testator's real estates by virtue of that his will."

T. P. tenant for life died without issue, and without having executed the power given by the will, to adopt a male relation of the testator. The next or nearest relations, or nearest of kin of the testator, of the name of *Pearce*, being males, at the time of his death, were his three first cousins; 1st, the tenant for life *T. P.*; 2dly, *R. P.* the plaintiff; and 3dly, *W. P.* his brother. Testator had had a brother *Zachary*, who if then alive, or his son, had he left one, would at the testator's death have been the testator's next and nearest relation, &c.; but *Zachary* had gone to sea, and had not been heard of for many years, nor was any male issue of his known to have existed: Held, that if *Zachary*, the testator's brother, died without issue in the lifetime of the testator, *T. P.* took under the ultimate limitation of the will an estate in fee simple in the testator's real property, and an absolute interest in his personality.

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nances. And also all and every his lands, real estates and hereditaments (both freehold and copyhold) situate and being in the several counties of *Hertford*, *Leicester* and *Northampton*, (except the *Westminster* and *Rushden* estates, before devised by that his will, to be sold as above stated, and the advowson of the church or rectory of *Husband's Bosworth* in said will mentioned, and the presentation thereto) or elsewhere the same might be situated, unto his cousin *Thomas Pearce* and his assigns *for and during the term of his life*. And the said testator gave, devised and bequeathed all his said manors, and his advowson of the parish church or rectory of *Husband's Bosworth* aforesaid with its appurtenances, and all his lands and hereditaments situate in the said counties of *Hertford*, *Leicester*, and *Northampton*, and elsewhere, with their appurtenances, and all his stock, funds, and securities for money, and all and singular other his real and personal estate, (save and except as thereafter or by any codicil to be added to his said will was specifically bequeathed or mentioned.) And also all his the said testator's copyhold lands and hereditaments situate in the said several counties, or wheresoever else the same might be situate, (except the *Westminster* and *Rushden* estates thereinbefore devised,) subject nevertheless to the life estate thereinbefore given to his said cousin *Thomas Pearce* of and in the said manors and manorial rights, lands, hereditaments, freehold and copyhold estates, and to the payment of the said annuity and every other annuity contained in that his will, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, declarations, and agreements thereafter mentioned, expressed and declared, and hereinafter stated. And in case such person as thereafter was mentioned as his the said testator's said cousin, *Thomas*

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Pearce should approve of or adopt, should be under the age of 21 years at the decease of his said cousin *Thomas Pearce*, the said testator gave an annual sum of 200*l.*, to be applied for and towards the maintenance and education of any person being a male relation of him the said testator of the name of *Pearce*, whom the said *Thomas Pearce* should approve of and adopt, and should signify the same in writing under his hand, which he the said testator did thereby authorize and direct him the said *Thomas Pearce* to do as soon after his the said testator's decease as he could conveniently, from the time of his said cousin *Thomas Pearce's* decease, until such person should have attained the age of 21 years. And from and after the decease of his the said testator's said cousin *Thomas Pearce*, the said testator devised all and singular the said premises, as well his real estate as personal, as all accumulations thereof, to such of his the said testator's relations of the name of *Pearce*, being a male, as his cousin the said *Thomas Pearce* should by any deed or writing signed by him, in the presence of two subscribing witnesses, or by his last will and testament in writing by him to be executed in the presence of three or more credible witnesses, give, devise, or bequeath, or nominate or appoint the same to. And in default of any such gift, devise, bequest, or nomination or appointment, by his the said testator's said cousin *Thomas Pearce*, to or in favour of any such male relation of him the said testator, of the name of *Pearce* as aforesaid, then the said testator devised the said estates and premises to such of his the said testator's relations of the name of *Pearce*, being a male, as the said *Thomas Pearce* should approve of or adopt, for the purpose of education as aforesaid, if he should be living at the time of the decease of his the said testator's said cousin *Thomas Pearce*, and his heirs, executors, administra-

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tors, and assigns for ever. And in case his the said testator's cousin *Thomas Pearce* should not have approved or adopted any such male relation of him the said testator as aforesaid, or in case he should have made such approval or adoption of any such male relation of his the said testator's, and there should not be any such male relation living at the time of the decease of his said cousin *Thomas Pearce*, then the said testator devised the said estates and premises unto the next and nearest relation or nearest of kin of him the said testator of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one of equal degree who should be living at his the said testator's decease, his heirs, executors, administrators or assigns for ever (being the clause to which the questions referred as being the ultimate limitation). And as to the said testator's advowson or rectory of *Husband's Bosworth* aforesaid, the said testator gave the first and next presentation to the same rectory, which should happen upon his decease, unto certain persons therein mentioned in succession. And in case none of them should choose to present themselves or declare their intention of so doing by the time allowed them as therein mentioned, or should refuse the same, such refusal to be declared as therein mentioned, then the said testator directed that the presentation to his said rectory or living of *Husband's Bosworth* should at all times go and belong to his said cousin *Thomas Pearce*, (whenever the said rectory should become vacant,) to present to at all times during the life of him the said *Thomas Pearce*. And the said testator gave all his plate, books and pictures, household goods, beds, bedding, linen, and household furniture at *Husband's Bosworth* and *Stanwick*, in the said will mentioned, or elsewhere, to his executors, in trust to permit and suffer his said cousin

Thomas Pearce to have, use, and enjoy the same during his life; and after his decease, then in trust for the person who should succeed to or inherit his the said testator's real estates under and by virtue of that his will. And the said testator declared his mind and will to be, and he did thereby order and direct his said cousin *Thomas Pearce* to pay and apply so much of the rents and profits of his said estates so given, devised, and bequeathed by him the said testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him the said testator of the name of *Pearce*, whom his said cousin should approve of and adopt in manner aforesaid, in case such male relation should at the time of his adoption by his the said testator's said cousin be a minor under age, until such person should have attained his age of 21 years, and lay out and invest the residue of the said annual sum of 200*l.*, (not expended in such maintenance and education,) at interest, to accumulate in the name of his the said testator's said cousin *Thomas Pearce*, in some of the public funds or upon government or real securities, during the minority of such male relation of the name of *Pearce*. And the said testator declared and directed that his said cousin *Thomas Pearce*, his executors and administrators, should stand seised of such accumulations, in trust for the benefit of such male relation of the name of *Pearce*, and the same, with the dividends and interest, should be assigned to him at such times and in such proportions, after he should have attained his age of 21 years, as his the said testator's said cousin *Thomas Pearce*, his executors or administrators, should think most to his advantage. And in case of his death before attaining 21 years of age, then in trust

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for the benefit of such male relation of the said testator of the name of *Pearce*, as should, upon the decease of his the said testator's said cousin, become entitled to his the said testator's said estates by virtue of that his will. And in case such male relation of him the said testator of the name of *Pearce*, so approved of and adopted by his said cousin *Thomas Pearce* as aforesaid, should in the lifetime of his said cousin attain 21 years of age, then the said testator willed and directed his said cousin *Thomas Pearce*, during his life, to pay and allow out of the rents and profits of the estates so devised to him for his life as aforesaid, unto such male relation, from the time of his attaining 21 years of age, the whole of the said annual sum of 200*l*. Provided also, and the said testator declared, that it should be lawful for, and he did thereby authorize and empower his said cousin *Thomas Pearce* to demise or lease all or any part of his said manors, farms, lands, and tenements, for any term or number of years, not exceeding seven years, to take effect in possession, and at the best and most improved annual rent presently payable, and without taking any fine or premium as therein mentioned.

The said *Richard Pearce* the testator departed this life on the 3d *January* 1814, without leaving any issue, and without having revoked or altered his said will.

Thomas Pearce, the tenant for life named in the said will of the said *Richard Pearce*, died without issue, and never did in any manner execute the power of adoption or selection of a relation of the said testator under or according to the said will.

The next or nearest relations or nearest of kin of the said testator *Richard Pearce*, living at his decease of the name of *Pearce*, being males, were his three first cousins; *viz.* 1st, the said *Thomas Pearce* the tenant for life, who was the son of *Robert Pearce*

deceased, who was the uncle of the said *Richard Pearce* the testator: 2dly, *Richard Pearce*, the plaintiff in this suit, who is the son of the said testator's uncle *William Pearce*: and 3dly, *William Pearce*, the brother of the said plaintiff. And the aforesaid three cousins were, at the time of the decease of the said *Richard Pearce* the testator, of the respective ages following; (that is to say) the said *Thomas Pearce* 67 years, the said *Richard Pearce* the plaintiff 66 years, and his brother the said *William Pearce* 59 years, according to the pedigree of the said testator and his relations.

A pedigree set forth in the case also showed that the testator had a brother named *Zachary*, who was baptized in *December* 1761, and had gone to sea and had not been heard of for many years.

The questions for the opinion of the court are,

1. Whether, under the circumstances which are stated, *Thomas Pearce* took any and what estate under the ultimate limitation contained in the will of the said testator.

2. Whether, under the circumstances which are stated, the plaintiff, *Richard Pearce*, took any and what estate under the ultimate limitation contained in the will of the said testator.

The case was argued in *Easter* term by

W. Rogers for the plaintiff. The questions stated resolve themselves into one, viz. whether under this devise *Thomas Pearce*, the tenant for life, could by possibility take an estate in fee?

Now the terms of the will entirely exclude *Thomas Pearce* from more than a life estate; for in default of appointment by him the estates are directed to go to the testator's next of kin living at *his* decease. The whole frame of the will goes to confer the fee on a

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person to be selected by him. Thus, in the first place, it contains provisions for the maintenance of any person so selected; it next gives the presentation of *Husband's Bosworth* to *Thomas Pearce* at all times during his life. The plate, books, &c., are then given to the executors, in trust to permit and suffer *Thomas Pearce* to have and enjoy them during his life, and after his decease then in trust for the person who should succeed to or inherit his (the testator's) real estates by virtue of that his will. It is therefore clear that the testator intended that his next male relation named *Pearce*, but *not* being the tenant for life, should succeed to the fee-simple of his estates on that party's death, or rather that the reversion in fee on that event should vest in some other person, not being *Thomas Pearce* the tenant for life. In *Bird v. Wood* (a) stock in the funds was bequeathed to trustees in trust to pay the dividends to the testator's daughter for life, and after her death to transfer the stock and pay the dividends to such person as the daughter should by deed or will give or devise the same; and for want of such gift or devise, then upon trust to assign and transfer the stock and pay the unpaid dividends thereof unto her own next of kin, according to the statute of distributions, "to be considered as a vested interest *from the time of the testatrix's death*." The daughter died intestate, without having had a child and without executing the power, and *Leach* V. C. held, that the persons who at the testatrix's death would have been her next of kin, if her daughter had been then dead without children, were plainly intended. The daughter could not be such next of kin, for the persons intended were to take at her death; and the persons intended must have been living at the death of the testatrix, for their interests were then to be vested. The question

(a) 2 Sim. & Stu. 400.

whether persons living at the testator's death, or at the death of the tenant for life, are to be preferred, was there decided, by excluding the latter. Then that decision shows that the gift to the next of kin of the testator living at his death, excludes *Thomas Pearce*, the tenant for life, but vests the fee in the next of kin, not to the testator, but to *Thomas Pearce*, after whose death it is to be taken. That construction is one of common sense, and justified by *Leigh v. Leigh* (a), where *Lawrence J.* says, "that the question whether a party answers the description in a will, will depend on whether the plaintiff comes within the meaning of the words as they have been used by the testator; and though it be true that if that meaning be ascertained, no reasoning from supposed cases can induce the court to put a different construction on the will, but can only lead to a conclusion that the testator did not see all the consequences of the disposition he may have made, yet in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." The court, when it adopts that rule, must see that it would be absurd and inconsistent with the power given to *Thomas Pearce*, the tenant for life, to appoint a person to take after him, that he should himself take any further estate than for life. The testator's intention was no more, as is shown by the gift of personalty in trust for *Thomas Pearce* for life, and "after his decease then in trust for those who should succeed to or inherit the testator's real estates by virtue of his will." But if the words "next and nearest of kin" do not necessarily exclude *Thomas Pearce*, the tenant for life, the court will effectuate the purpose of the testator by inserting

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"except *Thomas Pearce*;" *Doe v. Turner (a)*. The words "to him" were inserted to prevent a clause becoming absolutely void, and to effectuate the testator's apparent intention, to give the fee to the testator's nephew.

Preston contra for the defendants. The necessity of carrying into effect a testator's intention, apparent on the face of a will, and which must otherwise fail, will alone induce the court to add words to a will. If *Thomas Pearce* having become insane, so as to prevent his making an appointment, had left a son and heir, is there any thing to show the testator's intention to exclude that son? *Bird v. Wood* can only be supported upon the special clause not yet cited, viz. that the interest was to be vested from the testatrix's death, "except as to any child that might be afterwards born of her daughter." That exception clearly excluded the daughter, by making her the mere medium of transmission to the child, if she had one. But there is nothing in the language of this will, taken in its general sense, which shows any intention to exclude the son of *Thomas Pearce*, had he had one. [*Bayley B.* Might not he have taken as next of kin?] The tenant for life is not such only, but having also power to dispose, though not exercised. In *Holloway v. Holloway (b)* a testator by codicil gave 5000*l.* to trustees in trust to put it out and pay the interest to his daughter *H.* separate from her husband, and after the decease of his daughter *H.* then upon further trust to pay the said sum of 5000*l.* to such child or children of her's as she should have at the time of her decease, in such proportions as she shall think proper to give the same; and in case she died leaving no child, then as to 1000*l.*, part thereof, in trust for the executors &c. of the daughter; and as

(a) 2 D. & R. 398.

(b) 5 Ves. 399.

to the remainder, in trust for the testator's heirs at law. Testator died, leaving *H.* and two other daughters his next of kin. *H.* died without issue. *Arden M. R.* held that the 4000*l.* vested in *H.* and the other daughters, being coheiresses at law and next of kin at testator's death. But there was more reason for excluding *H.* there, for she had a provision for life, which might be said to limit the testator's bounty to what he expressly gave her. In *Doe d. Ballantine v. Lawson (a)*, the devise was to testator's natural son, and in case of his marrying any daughter of *J. J.*, or dying without issue, then to the nephew for life, "and after his decease" then to the trustees for and amongst such person and persons, and his and their heirs, as should appear and could be proved to be his next of kin, in such proportions as they would by virtue of the statute of distributions have been entitled to his personal estate had he died intestate; and it was held that the testator having referred expressly to the statute of distributions, the distribution was to be made among such as were next of kin, not at the taking effect of the limitation over, when the marriage provided against took place, but at the earlier event of the testator's own death, though the nephew who took the prior life estate was one of those next of kin. The defendant's struggle there was to postpone the time of vesting the interest in the next of kin till the contingency of the prohibited marriage took place, which would have excluded the lessor of the plaintiff (*b*). [*Bayley B.* There such a class was to take as could be shown to be testator's next of kin. Lord *Lyndhurst C. B.* There was no inconsistency there.] The bequest of the personality shows nothing, for by the will it might go to others; but the testator preferred that his eldest male relation should take the fee of his real estate; then

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(a) 3 East, 278.

(b) See *Wood's Argument*, 3 East, 287, 288.

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could a son of *Thomas Pearce* have been excluded by the will? and if he could not, will the court apply words to exclude *Thomas Pearce*? [Lord Lyndhurst C. B. In your view if *Thomas Pearce* took the life estate, he would also take the whole interest. If so, why did the testator incumber him with power to select a person to succeed to it?] The testator might not know his other two nephews and be ignorant who were his next of kin. If ever a case existed for excluding the tenant for life from taking the ultimate fee, it was *Dos v. Maney* (a). [Bayley B. The question there was, whether a remainder remained contingent till the occurrence of a particular event after the testator's death, viz. the death of the last tenant for life without issue; or whether it vested in the person who was the testator's heir at the time of his death.] To arrive at that construction it was necessary to see whether the words of the will excluded the tenant for life from ultimately taking the fee, and to hold that they did not. That decision repels the argument, that because *Thomas Pearce* is to take an estate for life he is so necessarily to be excluded from taking the fee, that words must even be introduced to prevent that event. There the testator devised all his real estate (except *Swinstead*) to his nephew, a duke, the head of the family, for life, and in succession to several other younger nephews, to each for life, with remainder to their sons in tail male, with ultimate remainder to testator's own right heirs. He then devised *Swinstead* to the second son of the duke for life, remainder to one of testator's nephews, (to whom he had devised a part of the first estates,) remainder to the youngest son of the duke, to each for life, with remainder to his first and other sons in tail male; and for default of such issue devised *Swinstead* to such person and persons, and for such estate and

(a) 12 East, 589.

estates as should *at that time*, (i. e. on the death of the last tenant for life without issue male,) and from time to time afterwards, be entitled to the rest of his real estates *by virtue of and under his will*; and the court held that the ultimate remainder in fee of the estate at *Swinstead* vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency under the will until the death of the last tenant for life without issue male who was named in the devise of that estate. Then as no rule of law excludes the person taking for life from taking in fee, he cannot be excluded, unless the description in the will applies better to some other. Here *Thomas Pearce* answers the description, while the plaintiff does not, except by forced construction. [Lord *Lyndhurst* C. B. A son of *Zachary Pearce*, a brother of testator, might have appeared and claimed.] That may account for the words of the will, giving *Thomas Pearce* power to provide for the benefit of any such son. Then as no such son appears to have existed, there is less reason for excluding *Thomas Pearce*.

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Rogers in reply. [Lord *Lyndhurst* C. B. Where is there inconsistency, if you suppose the testator to have contemplated *Zachary* to be alive, or to have sons? It is a *petitio principii* to say that the testator considered *Thomas Pearce* as done with.] *Thomas* might have excluded *Zachary* or his son. [*Bayley* B. But he does not do so; then had *Zachary* or his son appeared the nearest of kin to testator would have taken before *Thomas*. That would be to give to *Thomas* for life with power of appointment, in default of appointment to *Zachary*, if living, he being the elder male relation of equal degree; remainder to his issue, remainder to *Thomas* and his issue, remainder to *Richard*. However, unless the limitation vested the fee in *Thomas*,

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then had he married and had a son after the testator's death, he could not have taken under the will. Lord *Lyndhurst* C. B. It is contended that we cannot give the effect to this will which was intended by the testator without introducing words. Now is there any necessity for so doing, or any inconsistency, if the testator contemplated *Zachary* and his descendants? The "next and nearest" of kin spoken of by testator means next and nearest to *Thomas*. *Holloway v. Holloway* was a simple devise of the property, to go as at law it would have done had it been personalty, without the testator's direction. In *Doe v. Maxey* the ultimate reversion was limited to the testator's heir at law; and Lord *Ellenborough* asked, "is it not the same as if it had been to his own right heirs?" [Lord *Lyndhurst* C. B. The nearest male relation to the testator at the time of his death must take. *Thomas Pearce* would be the nearest then, and had he had sons, then, in default of appointment by him, the eldest would claim through him.]

Cur. ado. vult.

The following certificate was sent in this term:

"This case has been argued before us by counsel. We have considered it, and are of opinion that, under the circumstances here stated, if *Zachary Pearce*, the testator's brother, died without issue in the life-time of the testator, *Thomas Pearce* took, under the ultimate limitation contained in the testator's will, an estate in fee-simple in the testator's real estates, and an absolute interest in his personalty.

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J. BAYLEY.

J. VAUGHAN.

W. BOLLAND.^d

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BUTLER *against* FORD and LEDGER.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and for assaulting and imprisoning him. Plea, general issue. The plaintiff had, about eight o'clock on the evening in question, beaten a boy in his service, who ran out of his house bleeding from the head, and pursued by the plaintiff. The boy escaped, having told a neighbour that he had been cut with a knife by the plaintiff, which statement was made known to a crowd which had collected, and ultimately to the defendants, who were constables and watchmen appointed under a public local act, 6 G. 4. c. cxxxiii. intituled "An act for paving, &c. watching, regulating and improving the town of *Leamington*." On hearing of the occurrence they came to the spot, and went into a back room of the plaintiff's house, where he was lying on the floor. They seized him, saying they wanted him, and that they would tell him what for bye and bye. He refused to go till he knew the charge against him. They then pulled him along towards the outer door of the shop. The plaintiff abused them much, struck one of them and violently

By a public local act certain commissioners were empowered to appoint by writing such surveyors, scavengers, &c., beadle, constables, watchmen, &c. for the execution of the purposes of the act, as they should from time to time think proper. They were also authorized to appoint able-bodied watchmen to act in the night, who were required by the act to apprehend and secure malefactors and suspected persons found wandering or

misbehaving themselves during the hours of watching. The watchmen were to be sworn in as constables, and invested with similar powers. By a subsequent section it was provided, that no action &c. should be commenced against *any person or persons for any thing done or to be done under or by virtue of that act* until one calendar month's notice should have been first given in writing to the clerk of the commissioners, of the cause of action, nor at any time whatever after sufficient satisfaction or tender made to the party aggrieved:—Held, that the section requiring notice to be given, extends to acts done by constables and watchmen. 2dly. That the *prima facie* evidence that constables and watchmen had acted as such, entitled them to such notice without producing their written appointments. 3dly. That where there was reasonable ground of suspicion that felony had been committed by the plaintiff, and the constables went accordingly to his house to apprehend him for it, but used more violence than necessary for that purpose, and beat him, they were entitled to notice.

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resisted being taken, by holding the door-posts. Thereupon the defendants hit his arms and legs hard with their staves, and got him into the street, saying they would take him; and, in answer to a bystander, said that they had no warrant and did not require one. A mob having again assembled, placed themselves so as to hinder the plaintiff being carried away, and the defendants finally suffered him to return into his shop, saying that they had information he had cut open his boy's head with a knife, but that they had told him they were willing to let him remain quietly in his house till the morning, and should not have apprehended him then if he had not abused them.

By the local act above mentioned, certain persons were appointed commissioners, who by section 11 were empowered to appoint, by writing under their hands, a treasurer and clerk, collectors of rates, " and also all such surveyors, scavengers, rakers, cleansers, water keepers, lighters of lamps, beadies, *constables, watchmen*, and such other officer or officers, deputies or assistants for the purposes of the act, as they should from time to time think proper, with power to suspend or displace them, and appoint others in their room. By section 77 the commissioners were authorized from time to time to appoint such number of able-bodied men as they should judge proper to be employed as watchmen within the town during the night-time, under the regulations and orders of commissioners, and to provide proper watch-houses or places for their reception, and for the safe custody of persons apprehended by such watchmen while on duty, and to fine and discharge them for neglect of duty.

By section 78 the watchmen were to be sworn in as constables before a justice to act as such whilst in the execution of the act, and were to be invested with the like powers and authorities, privileges and immunities

which any constables are invested with, or have or enjoy by law.

By section 81 the watchmen are made subject to three months' imprisonment by two justices for neglect or misconduct.

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Section 163 enacted, that no action, suit or information should be commenced against any person or persons "for any thing done or to be done under or by virtue of this act," or any bye-law, rule or order made in pursuance thereof, until one calendar month's notice thereof should have been first given in writing to the clerk to the commissioners, signed by the intended plaintiff, of the cause and intention of and for commencing such action or suit, nor at any time whatsoever after sufficient satisfaction or tender should have been made to the party aggrieved, nor after six calendar months' next after the fact committed for which such action or suit should be brought; and in case no such tender should be made before such action, that it should be lawful for the defendants in any such action, by leave of the court before issue joined, to pay into court such sum as he shall think fit, whereupon such proceedings were to be had as in other actions, where the defendant is allowed to pay money into court. It was also provided that the venue in all such actions should be laid in the county of *Warwick*; that the defendants might plead the general issue and give the acts and the special matter in evidence; and that the matter or thing for which such action or suit shall be so brought was done in pursuance and by the authority of this act, or by some bye-law, rule or order, made in pursuance thereof.

For the defendants it was proved that both of them were duly sworn in before a magistrate to execute the office of constable under the local act, and that they

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had acted as such ever since. A written appointment of *Ford* as head constable and watchman, dated previously to the accruing of the subject-matter of the action, was also proved. The defendants' counsel pressed for a nonsuit for want of a notice of action under section 163. For the plaintiff it was said, that *Ledger* was without defence, he having merely acted as constable and watchman, and no written appointment of him to that situation having been proved. *Denman C.J.* gave them leave to move for a nonsuit, and asked the jury, 1st, Whether they had reasonable ground for suspecting that the felony had been committed? 2dly, Whether they went to apprehend the plaintiff on account of that suspicion? and 3dly, Whether they used more violence than was necessary to apprehend the plaintiff? The jury having answered the two first questions in the affirmative, found a verdict for the plaintiff as to the last for 50*l.* damages, on the ground that much greater violence had been used by the defendants than was necessary. A rule for a nonsuit having been obtained,

Goulburn Serjt. and *Humfrey* showed cause. 1st, Notice of action was unnecessary, for section 163 only applies to "any thing done in pursuance of the act" by the commissioners themselves. If it applied to acts of their subordinate officers, their lamp-lighters and scavengers would be equally entitled to notice of action, the defendants having come up after the first mob had dispersed, acting not as watchmen but as constables. 2dly, The damages given by the jury were confined to the violent conduct of the defendants in beating the plaintiff, which was foreign to their character as constables. Now notice to defendants is only required in cases where it appears from their acts, that they might reasonably suppose they were warranted by law in acting

as they did; see per *Bayley J. Cook v. Leonard* (a), *Morgan v. Palmer* (b), *Irving v. Wilson* (c). The evidence here is, that they seized the plaintiff without informing him of any charge against him, and apprehended him at the time they did, not because felony had been committed, but because he abused them. *Bayley B.* The original seizure was here lawful, whereas in the two cases last cited there was no colour to suppose that any part of the act complained of was lawful.] Had the seizure been the defendants only act, it might be that no action would have lain; but the damages were given not for the seizure, but for excess in beating the plaintiff. Had that act been in part lawful, but from mistake or inadvertence also in part illegal, they would have been entitled to notice, *Greenway v. Hurd* (d), but beating was no part of an officer's duty. 3dly, The plaintiff is at all events entitled to retain his verdict against *Ledger*, who has not proved a written appointment as constable and watchman, pursuant to section 11. For he as an officer derived authority from a local act, which requires his appointment to be written. Then he ought to have brought himself clearly within its terms. For though evidence of acting as constable may be sufficient in case of officers appointed at common law in the usual way, it is merely equivocal in this case, for he might be an ordinary constable acting within the limits comprised in the local act, but not authorized to do so by the commissioners. [Lord *Lyndhurst C. B.* This is a public local act, and as such part of the statute law of the country. The officers acting under it were well known to be such in *Leamington*. *Berryman v. Wise* (e) shows that it is sufficient to prove that peace officers, constables, &c. acted in those characters with-

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(a) 6 B. & C. 351. (b) 2 B. & C. 729. (c) 4 T. R. 485.

(d) 4 T. R. 555, per Lord *Kenyon*. (e) 4 T. R. 366.

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out producing their appointments; and *Buller J.* cited *Gordon's case* (a), where all the judges held, on an indictment for the murder of an officer in execution of his duty, that his appointment need not be proved, and that proof of his acting as such was sufficient.]

Adams Serjt. and *Hayes contra.* As to the first point, if the notice provided by section 163 is construed as confined to the acts of the commissioners themselves, and not to their acting deputies, the constables and watchmen, it would defeat the manifest object of that provision, which was intended to protect the latter. By section 77, "watchmen are expressly required to arrest malefactors, disturbers of the public peace, and suspected persons wandering or misbehaving themselves during the hours of keeping watch." Now as there was reasonable ground for suspecting a felony to have been committed within those hours, the defendants were not only authorized to apprehend the plaintiff, but would have been punishable under other sections of the act if they had not. Are they not then in reason entitled to the protection of the act from which they derive their whole authority, and which punishes them for neglect to exercise it under circumstances like the present? Secondly, it appears from the verdict that part of the defendants' act, viz. the original apprehension of the plaintiff, was legal. Now their subsequent violence, which was found by the jury to be excessive, was the latter part of one and the same continuous act of apprehending the plaintiff, and took place in consequence of his resistance. That is the ordinary case of a party exercising a legal authority and exceeding it, in which many decisions have established that notice of action must be given in order to enable the officer to tender sufficient amends. If

(a) *Northamptonshire spring assizes, 1780; reported Lench C.C. 564.*

the opposite argument should prevail, the absurdity would follow, that notice could only be necessary where no breach of the law whatever had been committed by the officer. The court then stopped them.

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Lord LYNDBURST C. B.—This action was brought against the defendants for breaking and entering the plaintiff's house, and imprisoning him. It appeared in evidence at the trial, that the defendants filled the situations of watchmen and constables, and that there was good ground for suspecting that a felony had been committed. In the attempt to arrest the plaintiff there was a struggle and contest, in which the defendants used more violence than was necessary. The jury found, 1st, that the defendants had reasonable grounds for suspecting that a felony had been committed; 2dly, that they went to the plaintiff's house in order to apprehend him for the same; and 3dly, that they used considerably more violence than was necessary for that object, and the plaintiff had a verdict for 50*l.* damages on the latter ground. It has been admitted that no notice of action was given, and it is made a question whether it was requisite. It is contended, in the first place, that section 163 of the *Leamington Improvement Act*, which requires notice to be given, only applies to the acts done by the commissioners themselves, or directed by them to be done. I am of opinion that the act furnishes no ground for that argument. Nothing can be more general than the terms of the section: it says, that "no action, suit, or information shall be commenced against any person or persons for any thing done or to be done under or by virtue of this act, until one calendar month's notice thereof shall be first given in writing to the clerk of the commissioners, signed by the intended plaintiff, of the cause and intention of, for, and concerning such

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action or suit, nor at any time whatsoever after sufficient satisfaction or tender shall have been made to the party aggrieved;" and it appears to me that we should not be justified by those words, or by the general terms of the act, in putting on section 163 the limited construction contended for. The clause intended to give the commissioners notice of intended proceedings, in order that if their officers had been guilty of excess, the commissioners should have an opportunity of tendering sufficient amends to the party injured; whereas the more limited construction contended for would defeat that object. If a precedent were necessary to support our judgment on this subject, *Graves v. Arnold* (a) would warrant us in the view we have taken. In that case, as in the present, the defendants acted under a local act as peace officers, and exceeded the powers conferred on them by it; but Sir *James Mansfield* held them entitled to notice as acting under colour of the act.

The next point was, that sufficient evidence was not offered at the trial to establish that the defendants were constables and watchmen. But I am of opinion that it having been proved that they were acting in the character of peace officers, that was sufficient proof of the fact without making it necessary to produce or prove their appointments as such. Whether their appointments were in writing or not, did not appear; but all the adjudged cases prove that the having acted as a peace officer previous to and at the time of committing the act complained of, is at least *prima facie* evidence that the party so acting was duly appointed to that office.

The last question was, whether, assuming these defendants to be peace officers, their act was in this instance of such a description as enabled them to avail

(a) 3 Campb. 242. See the general rule laid down in *Cook v. Leonard and Another*, 6 B. & Cr. 351.

themselves of any provision of this statute, directing notice of action to be given them. The facts found were, that they had sufficient reason to suspect that a felony had been committed by the plaintiff, and that they therefore endeavoured to apprehend him, and that upon his resistance, and in the course of so doing, they were guilty of an excess. Now an excess committed by peace officers in the execution of the duty imposed on them as such, is the very kind of case in which the statute was intended to provide protection for them; for the enactment enabling them to tender amends so as to free themselves from the consequences of that excess, would be useless if it was only necessary to give notice of action to them, where they have kept within the strict line of their duty (a). I am therefore of opinion that a nonsuit should be entered.

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BAYLEY B.—It is quite clear from the terms of sect. 163, that that section is not confined to the acts of the commissioners themselves, and that if a party is doing an act authorized by the statute, he is acting under and by virtue of it. Notice of action therefore was essential to be proved. I am also of opinion that sufficient evidence was given under this act, that the defendants filled those situations of constables and watchmen, which the act intended to protect. In ascertaining the nature of a transaction composed of several acts ejusdem generis, you must look, not at insulated parts of it, but at the whole. Here was sufficient ground for suspicion that the plaintiff had been guilty of a felonious cutting, and it is in the legally apprehending the plaintiff on that suspicion, and in carrying into effect the legal measure of securing the plaintiff in order to carry him before a magistrate, that that degree of violence was used which the jury has found to be unjustifiable. I am of opinion that the defendants, in acting in the

(a) See *Thobald v. Crickmore*, 3 B. & Ald. 227.

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discharge of a duty imposed on them by statute, exceeded the line of that duty. That is the very case in which they were entitled to notice of action in order to enable them to tender amends. The cases cited by the plaintiff's counsel do not apply, for reasons I have stated. On the last point, had the production of a written appointment been necessary, it was enough to prove the written appointment of *Ford* in order to entitle *Ledger* to notice as acting in his aid. But the other evidence that these defendants had been in the habit of acting as peace officers was sufficient under the general rule. Nor can I distinguish between peace officers appointed under a local act, and other peace officers.

VAUGHAN B.—I am of the same opinion. The material question is, whether the defendants were entitled to notice? In support of the negative, it has been argued as if the violence found by the jury to have been unnecessary, was in its nature an isolated act, and not an act in the nature of excess only. But it has been well argued for the defendants, that the legal arrest and subsequent excessive, and therefore illegal violence, are parts of the same transaction. For it seems to me that that violence, which on the defendants' part is called the excess, cannot be separated from the rest of the act upon which it was consequent. If so, and the seizure and unnecessary violence were only parts of one continuous transaction, the statute was intended to give the defendants the benefit of notice. In *Greenway v. Hurd* (a), Lord *Kenyon* says, it has frequently been observed by the courts that the notice which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the pur-

pose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. Again, in *Weller v. Toke* (a), the defendant, a magistrate, had no authority singly to commit a mother for not filiating a bastard. Yet as he had jurisdiction over the subject-matter, though not alone, and intended to act as a magistrate, at the time, however, mistakenly, he was held entitled to notice. I am of opinion that the defendants acting in their office of constables and committing excess, are responsible for it, subject to those enactments of this statute which require notice to be given.

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BOLLAND B.—On the first point I am of opinion that the words of section 163 show that that section was intended to apply to all parties acting under or by virtue of the act. On the second point, I think that it having been distinctly established by the evidence that the defendants had for some time acted in the capacities which by the local act entitled them to notice, that evidence, till rebutted, was sufficient proof of their appointments. As to the remaining point, the argument for the plaintiff ingeniously seeks to rest his right of action on the excess ascertained to have been committed by the defendants, and on that only. But I think it cannot be so separated from the original seizure, or the enactments requiring notice might be evaded by a plaintiff taking the chance of a trial to prove excess, and if successful, insisting that no notice of action was requisite, on the ground that the action had not been brought for the original apprehension, but for the excess only. Were that argument to prevail, difficulties would be imposed on the execution of process; for if a party apprehended should on his way to prison violently resist the officer, and occasion him

(a) 9 East, 364; see also 4 B. & C. 200, 269; 3 M. & S. 580.

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to use great violence in return, evidence might be given appearing to prove that that violence was excessive, and if the officer was, as he might be, unable to show how it became necessary, he would be exposed to the risk of damages and costs by being deprived of that notice, which was provided in order to afford him opportunity to tender amends.

Rule absolute.

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The plaintiff was appointed by a leet jury and sworn in by the steward, chamberlain of commonable lands in a particular parish, belonging to certain free-men. It appeared that such chamberlains were sworn in yearly, and had no salary. Their duties were to

CASE for slander. The first count, after the usual inducement, stated, that before and at the time of the committing of the grievances after mentioned, the plaintiff had been and was employed as the servant of certain persons, to wit, the mayor, aldermen and burgesses of the borough of *Warwick*, in a certain situation, office and employment, to wit, the situation &c. of one of the chamberlains of the commons and commonable lands within the parish of *St. Mary*, in the borough of *W.* by virtue and in the exercise of which said employment it was the duty of the said plaintiff to receive and take into his possession from time to time

receive certain sums for agistment and other use of the land for races &c., and to drain and keep it in order out of such funds. They were to account for any surplus to two aldermen of a corporation, and to pay over any balance in hand to their successors in office:—Held, that such a chamberlain was not a servant or person employed in that capacity within the embezzlement act 7 & 8 G. 4. c. 29. s. 47.

Where, in a declaration for slander, an innuendo ascribes to certain words a particular meaning, which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated by the plaintiff so as to let him in to prove the words to have another meaning.

Quere, if the verbally imputing fraudulent embezzlement to such a chamberlain be actionable?

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divers large sums of money for and on account of the said mayor &c. That the plaintiff had always honestly performed all the duties of such situation, office and employment. Yet the defendant contriving to injure the plaintiff, and to cause it to be suspected and believed that he had been and was guilty of the offence of fraudulent and felonious embezzlement, and to subject him to the pains and penalties by the laws of this kingdom made and provided against persons guilty thereof, and to vex &c. the said plaintiff, in a certain discourse which the defendant had of and concerning the plaintiff as such servant of the said mayor, aldermen and burgesses as aforesaid, and of and concerning the conduct of the said plaintiff in his said employment in the presence and hearing of divers good &c., then and there in the presence and hearing of the said &c. falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning the conduct of plaintiff as such servant as aforesaid, in his said situation, office and employment, the false &c. words following, viz. "What have you (meaning the said plaintiff) done with the commoners' money (thereby meaning money received by the plaintiff by virtue of his said employment) you (meaning the said plaintiff) embezzled? Ask *Atkins* if you (meaning the said plaintiff) do not know what I (meaning the said defendant) mean." Thereby meaning that he the said plaintiff had fraudulently and feloniously and against the form of the statute in that behalf made and provided, embezzled money received by the said plaintiff by virtue of his said employment. Other words of general abuse inserted in the count are here omitted.

The second count stated the same words, with a different inuendo at the end, (viz: that he the said

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plaintiff had received money by virtue of his said employment, and had fraudulently and feloniously and against the form of the statute embzzled the same).

The third count stated these words to be falsely &c. spoke and published of and concerning the said plaintiff, and of &c., the conduct of the said plaintiff as servant to certain persons, to wit, the commoners of the parish of *St. Mary* in the borough of *Warwick* aforesaid, in a certain employment, to wit, the employment, situation and office of one of the chamberlains of the commons and commonable lands within the parish of *St. Mary*, in the borough of *Warwick*, which he the said plaintiff before that time and then exercised and was employed in, and by virtue of which said last-mentioned employment it was the duty of the said plaintiff to receive and take into his possession from time to time divers large sums of money for and on account of the said commoners of the parish of *St. Mary* aforesaid &c. the false &c. words, as in the first count, with the same innuendo, except concluding by virtue of the said last-mentioned office.

The fourth count was in substance similar, alleging the words to be spoken of and concerning plaintiff and of and concerning his employment, situation, and office of chamberlain &c. of the commons within the said parish and borough, and of and concerning the said plaintiff, and of and concerning the conduct of the said plaintiff in a certain employment, to wit, the employment, situation and office of one of the chamberlains of the commons or commonable lands within the parish of *St. Mary* in the borough of *W.* the false &c. words following, that is to say: "you (meaning the said plaintiff) are a rogue and a villain. What have you (meaning the said plaintiff) done with the commoners' money you (meaning the said plaintiff)

embezzled?" with the same innuendo as in the second count.

The last count set forth the same words, without referring to any office, and with an innuendo that the plaintiff had been guilty of fraudulent and felonious embezzlement, without reference to any statute. Plea, general issue.

The following facts appeared at the trial before *Denman C. J.* at the last *Warwickshire* assizes. Some of the commons belonging to the borough of *Warwick* are in the parish of *St. Mary* in that borough, and the plaintiff filled the office of one of the four chamberlains of them in that parish. The ownership of the soil is vested in the Earl of *Warwick*, or in the commoners of that parish, who are entitled to various rights of common in respect of their tenure of certain houses or scites in *Warwick*. The chamberlains are annually chosen at the court leet or view of frankpledge of the mayor &c. of the borough of *Warwick*, by the leet jury, who are summoned by the steward, who is town-clerk of the corporation, and swears them in with most of the other officers, as breadweighers &c. who are then nominated. The duties consist in keeping the commons in a good state as to sowing, fencing and draining &c., and generally superintending them. Their funds arise from pounding the commoners cattle twice a year till a certain rate per head is paid, and from sums paid by proprietors of booths, &c. set up at the races &c. usually had there. Their accounts are audited annually by two borough magistrates, and any balance in hand is paid over to their successors. The defendants' counsel applied for a nonsuit, on the ground that the plaintiff was not a clerk or servant or person employed in the capacity of either, within 7 & 8 G. 4. c. 29. s. 47., so as to be capable of felonious

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embezzlement within that act; whereas the inuendo in each count stated that the defendant intended to impute to the plaintiff the offence of felonious embezzlement, which did not exist at common law. The chief justice reserved the point, and the jury gave a verdict for 20*l*. A rule was accordingly obtained by *Hill* for entering a nonsuit, and *Smith v. Carey* (a) was cited.

Goulburn Serjt. and *Hayes* showed cause. The plaintiff, as chamberlain of these commons, was servant of the mayor and corporation of *Warwick* within 7 & 8 G. 4. c. 29. s. 47., so as to be open to indictment as such under that act, though servants to a body corporate are not expressly mentioned in it as they are in the former act 39 G. 3. c. 85. But the words of 7 & 8 G. 4. are sufficiently comprehensive to include such persons. The plaintiff is not the less a servant of a body corporate because called their officer, and appointed by the jury at the court leet of the corporation held before their town clerk as steward. Nor will the fact that the plaintiff was sworn into office at the same time with other officers of the corporation take him out of the act, resting as it does on the nature of the employment, and not on any incident to the mode of appointment. [*Bolland* B. An accountant of *Greenwich* hospital, who was sworn into that office, having embezzled money to a great amount, was indicted under 39 G. 3. c. 85., which expressly comprehended servants of bodies corporate, and *Burrough* J. held that the prisoner did not come within that statute, on account of its being proved that he was a sworn officer, and not employed as an ordinary servant.] The acts against embezzlement are not confined to ordinary clerks or servants.

(a) 3 Campb. 461.

Thus in *Rex v. Squire* (a) the accountant and treasurer to the overseers of a township was held within 39 G. 3. c. 85. [*Bayley* B. He was clerk and servant also.] So in *Rex v. Tyers* (b), a clerk to parish officers at a salary voted him in vestry, and in *Beacall's* case (c) the steward of the guardians and directors of the poor of parishes incorporated by a local act creating the office, and directing the mode of his appointment, were indicted without question as to their employments making them objects of the statute. And though a parish clerk who had embezzled the charity money which he had collected at the sacrament was held not within the act, it did not appear that he received it by virtue of his office, or by direction of the minister or churchwardens.

2dly, The fourth count does not allege the plaintiff to be servant to any one. The words themselves are actionable, so that the inuendo may be rejected as surplusage (d), *Corbett v. Hill* (e), *Smith v. Cooker* (f), *Roberts v. Camden* (g). For whether the plaintiff's office be public or private, malversation in it is imputed to him, and it was not necessary to show by any inuendo that the words charged an indictable offence in order to make them actionable. [*Bayley* B. In *Corbett v. Hill* the words imputed perjury to the plaintiff in his answer in the star chamber, inuendo, in a bill exhibited by him against the defendant. That inuendo was rejected as repugnant and void, but the words were held actionable of themselves as imputing criminal perjury. So it would be, if perjury were imputed to a man who had never been sworn in a court of justice. In *Smith v. Cooker* the rejected inuendo

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(a) Russ. & Ry. Cr. C. 349.

(b) Id. 402.

(c) Ry. & M. C. C. 15.

(d) See Starkie on Libel, 2d edit. 428.

(e) Cro. El. 609; see ante, Vol. II. 589.

(f) Cro. Car. 512; 1 Roll. Ab. 84.

(g) 9 East, 93.

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was repugnant, but the original words were at that time actionable as imputing witchcraft. In *Roberts v. Camden* the innuendo was bad. *Harvey v. French* (a) proceeded partly on this, that the innuendo being bad, might therefore be rejected. That objection was on the record, and did not arise on matter of variance from the evidence. The court first decided that the innuendo, though proved, was bad. It then became a question whether the count could be supported without it. But is there any authority that where an innuendo good in itself is not proved, a plaintiff can recover by applying another meaning to the words? In this case the damages were given after the objection was taken to the innuendo, and were therefore measured by the sense of the words themselves, as proved by the witnesses; whereas in *Harvey v. French* the damages might have been given in respect of the enlarged sense ascribed to a paragraph by a bad innuendo. *Smith v. Carey* (b) is only a nisi prius decision. The words were, "the plaintiff lives by swindling and robbing the public;" now to impute swindling verbally only is not actionable, *Suville v. Jardine* (c), and "robbing the public," taken per se, is mere general abuse. *Sellers v. TW* (d) appears to have proceeded on the ground that the words used were only actionable in respect of the plaintiff's character as collector, which situation he was not proved to fill. It seems immaterial that the office is not beneficial, but honorary only, if it is an office of trust; for slander of a churchwarden was held actionable in *Strode v. Holmes* (e).

3dly. If the words are equivocal, it was for the defendant to show that they were not used in the sense

(a) *Ante*, Vol. II. 585, in error.


(b) 3 Camp. 461.

(c) 2 Hen. Bla. 532.

(d) 4 B. & C. 745; 7 D. & R. 121.

(e) *Style*, 338; 1 Vin. Ab. Action for Words [T. s], 463; see 1 Starkie on Libel, 124.

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ascribed to them, and it was a question for the jury whether they were so used or not; *Cristie v. Cowell*(a), *Penfold v. Westcott*(b). Then no such point having been left to them, a new trial only can be granted. The words taken in their ordinary sense impute embezzlement, which is *prima facie* felonious within the statute. By using that word the defendant admitted the plaintiff's employment to be one in which embezzlement might be committed; and must have thought that he could impute felony. Nor have the jury negatived his intention to impute an indictable offence.

Hill and Bourne in support of the rule. First, the plaintiff was not a servant or employed in that capacity within 7 & 8 G. 4. c. 29. s. 47.; he had no master. The commoners had as much control over him as the mayor and corporation, nor had he the incident of service in pay or salary: next, though he accounted before two aldermen, he was not bound to pay the balance to them, but to his successors in office. His situation is quite distinct from that of a clerk having money in his hands received on his master's account, for, while he remained in office, he had a right to retain the money he received; and if he had that right at the time he was about to misapply the money, that misapplication is not within the act. Next, this is an office to which the plaintiff was appointed by a jury, of the court-leet, and sworn in by the steward. He was not appointed by or for the benefit of the mayor and corporation, but for the benefit of some of the freemen enjoying certain rights of common in a particular parish. [*Bayley* B. Cases in which persons

(a) 1 Peake C. N. P. 4; 2 Stark. Ev. 24. It occurred before 39 G. 3. c. 25. made embezzling a felony.

(b) 2 New Rep. 335; and see *William v. Stevenston*, 2 Pri. 228.

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have been held to be servants within the acts against embezzlement, on account of their plainly deriving authority from others who employ and control them as their masters, and to whom they were bound to pay money received on their account as soon as they received it, are clearly distinguishable from this case, where the plaintiff had a right to retain the money during his continuance in office.] His possession is not that of the corporation or commoners, neither of whom are entitled to it at any time. Secondly, can the plaintiff strike out of his own record, as surplusage, an inuendo which is not shown to be bad or repugnant? Had it been unsupported by or not properly connected with a previous introductory averment, it might have been rejected, if the declaration would be good after that omission. But the question here is not whether the record is good or bad in that respect, but whether the facts proved at the trial are such as would support the declaration on which the plaintiff has obtained a verdict? The defendant says they would not. This is a question of nonsuit for variance, whereas all the cases cited are either in error or on arrest of judgment, except *Smith v. Carey* (a). There the words being, that "the plaintiff lived by swindling and robbing the public;" the inuendo in each count was, that the plaintiff had been and was guilty of felony and robbery. The words appearing to allude to a transaction from which it might be inferred that defendant only meant to charge the plaintiff with a fraud, Lord *Ellenborough* said the words were in themselves actionable, and if there had been no such inuendo, as to their meaning, the plaintiff would certainly have been entitled to a verdict; but the plaintiff was bound to show them to be spoken in the sense he had ascribed

(a) 3 Camp. 461; see Cro. El. 250; 6 B. & Cr. 156, *Goldstein v. Fox*.

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to them, and that if the jury should be satisfied they were spoken with intent to impute not felony but merely fraud, there must be a verdict for the defendant. It did not appear there that the declaration was bad, but that the facts relied on to support it had not that effect. The same principle was acted on in *Sellers v. Till*, where the plaintiff was nonsuited for want of proving the words to be applicable to him in the manner he had laid them. Both cases directly apply. [Bayley B. There is nothing in my note of *Sellers v. Till* to bring that case within the principle of proving one of several allegations. The allegation was, that plaintiff was treasurer and collector; and for want of evidence that he was collector the plaintiff failed. It appears from *Woolnoth v. Meadows* (a) that if words are laid to be uttered and published by the defendant, with intent and meaning to convey a particular charge against the plaintiff to persons present, not only must it be proved that the defendant had that meaning, but that the words used were so understood by the hearers.] Here if the words impute misbehaviour in office to the plaintiff, reference must be made to the introductory averment, for the words are not themselves actionable, as they were held to be in *Smith v. Carey*. So in *Spall v. Massey* (b) the libel was not alleged to have been published of the plaintiff as a retailer of wine, though the declaration stated that he was such retailer. That allegation being unconnected with the libel, the plaintiff was allowed to strike it out. In *Teesdale v. Clement* (c) it was held necessary to go back to the introductory averment.

Thirdly. If the plaintiff cannot repudiate his own innuendo, his case would not be varied by the fact that

(a) 5 East, 470.

(b) 2 Stark. R. 559.

(c) 1 Ohitt, R. 604.

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his was an office as to his conducting which he might be slandered, for the inuendo imputes felony in every count. But there is no distinct allegation that this was an office, nor is it proved to be either employment, situation, and office laid in the fourth count. At the time of *Strode v. Hornes* (a) churchwardens had important duties in making presentments of recusants. [*Bayley* B. That decision rested on the onerous nature of the office, and the plaintiff's being obliged to take on him the burden of it.]

BAYLEY B.—I am of opinion that this rule should be made absolute for entering a nonsuit. It is material that we should see what allegations are contained in the declaration, and whether the whole or only part of them be satisfactorily proved; for if a material allegation is made, as to which there is a failure of evidence, the defendant is entitled to a nonsuit. The declaration commences with an averment preliminary to the five counts which it contains, and we must consider whether it applies to all or some only of those counts. It states, that before and at the time of the grievances thereafter mentioned, the plaintiff had been and was employed as the servant of certain persons, to wit, the mayor, aldermen, and burgesses of *Warwick*, in a certain situation, office, and employment, to wit, the situation &c. of one of the chamberlains of the commons and commonable lands within the parish of *St. Mary*, in the borough of *Warwick*, by virtue and in exercise of which employment it was the duty of the plaintiff to receive and take into his possession, from time to time, divers sums of money for and on account of the said mayor, aldermen, and burgesses. What the nature or specific character of the office or employment

(a) Sty. 338.

of chamberlain is, whether public or private, we are not apprised by the declaration. Nor is the office sufficiently described to enable us to judge what it is. The declaration then avers, that the defendant contriving to injure the plaintiff, and to cause it to be suspected and believed that he had been guilty of fraudulent and felonious embezzlement, and to subject him to the pains and penalties provided by the laws against persons guilty thereof, in a certain discourse which the defendant then and there had of and concerning the plaintiff as such servant of the said mayor, aldermen, and burgesses, and of and concerning the conduct of the said plaintiff in his said employment, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff's conduct as such servant as aforesaid in his said situation, office, and employment, the false words &c. After stating the words, an inuendo follows, that the defendant meant that the plaintiff had fraudulently and feloniously, and against the form of the statute in that behalf, embezzled money received by him, by virtue of his said employment.

The second count refers to the same preliminary matter, with a colloquium respecting the plaintiff's employment, and an inuendo nearly similar.

The third count resembles the first, except in stating the plaintiff to be the servant of the commoners of *St. Mary's* parish. All these counts ascribe to the plaintiff the character of a servant, stating the words to have been spoken of him as such, and the meaning of the libel to be that the plaintiff was guilty of embezzlement, not only fraudulent, but also felonious under the statute. Then it is material to see to what persons the statute 7 & 8 *Geo. 4. c. 29. s. 47.* applies, and whether the plaintiff can be said to be servant either to the mayor and corporation, or to the commoners of that borough;


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for if he cannot, neither of the above counts apply. Now that statute seems to contemplate clerks and servants of a very different description. Its words are, "if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel &c. for or in the name or on the account of his master, and shall fraudulently embezzle the same, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel &c. was not received into the possession of such master, otherwise than by the actual possession of such servant or other person so employed." That appears to me to apply to ordinary clerks or servants having masters to account to for the discharge of their duties. Now can this plaintiff be said to be such a clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury at the court-leet held annually by the corporation as lords of the manor, and was sworn in there as many other persons are. Then can the mayor and corporation be said to be his masters within this act? In the cases cited for the plaintiff the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers; *e. g.* the party appointed by the overseers to receive money. The parish clerk who received and misapplied the sacrament money was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the act, for he filled a distinct office of his own, in respect of which he received money which he was entitled to

keep till the year ended, and was not bound to pay over at any time, as a mere clerk or servant would have been.

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The fourth count does not refer to the prefatory averment, or state the plaintiff to be servant to any one, but lays the colloquium to have been "of and concerning the plaintiff, and of and concerning his conduct in a certain employment, to wit, the employment, situation, and office of one of the chamberlains of the commons &c. within the parish of *St. M.* in the borough of *W.*, with an inuendo like that in the second count." Now his post is described to be one which is either an employment, office, or situation; but no proof is given of the meaning of either of these respective words. It may or may not be a post, the holder of which being under a master, is a proper object of 7 & 8 *Geo. 4. c. 29.* It was argued that the inuendo might be rejected, at all events as to the part ascribing a meaning to impute felony, and that the plaintiff might then recover on this count; but as the count does not state what the nature of the office is, and as the law does not recognize it as it does the common law office of pindar, I do not think that any part of the inuendo can be rejected. I accede to Mr. *Hill's* position, that on motion in arrest of judgment, or in error, a plaintiff may reject an inuendo which is not warranted by the words themselves, or properly connected with them by prefatory matter. The cases cited for the plaintiff were of that kind; but the question here is, whether a plaintiff can reject an inuendo good on the face of it, on account of a variance or deficiency in his proof of it? Now when the question has arisen in error, or on arrest of judgment, the truth of the inuendo has been previously established in evidence; whereas here it is made a ground of nonsuit at the trial, that its allegations are

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not proved. It being charged that certain slanderous words were published of and concerning the plaintiff, the meaning ascribed to them by the inuendo is by it made parcel of the issue to be tried, so that a failure in proof of any part of the meaning so laid will be fatal to the plaintiff's case. I know no case which shows that the words themselves can be separated from the interpretations given them by the plaintiff in his inuendo, or that it would suffice to prove part of the inuendo by giving it a construction as containing divisible allegations; and *Sellers v. Till* (a), *Smith v. Carey* (b), and Lord *Ellenborough's* judgment in *Woolnoth v. Meadows* (c), appear to establish that the whole of an inuendo must be proved, unless it is bad on the face of it. Then, as the evidence in this case shows clearly that the plaintiff was not within 7 & 8 Geo. 4. c. 29., he has failed in proving the whole of the inuendo, and cannot recover on the fourth count. But even supposing that the inuendo, or that part of it which explains the words as imputing felonious embezzlement, could be rejected, I doubt if the plaintiff could retain his verdict. For as his post of chamberlain was not shown to be a public office, known to the law or beneficial to the holder, I doubt if the charge of fraudulent embezzlement by him, which would remain in the inuendo, would support an action. The case in *Styles* is plainly distinguishable. A churchwarden is a public officer, deriving authority partly from common and partly from statute law, so that malversation by him in his public office would amount to a misdemeanor. As this office is not shown to be public, I think that the charge of fraudulent embezzlement alone would not be sufficient to entitle the plaintiff to retain his

(a) 4 B. & Cr. 655.

(b) 3 Camp. 461.

(c) 5 East, 470.

verdict as for words spoken of him in his office. The last count does not carry the case further; for it cannot be sustained without proof of the whole of its inuendo, viz. that the words imputed a fraudulent and felonious embezzlement. I am, therefore, of opinion that this rule for a nonsuit must be made absolute.

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VAUGHAN B.—It is material to remember that the objection on which this rule is founded was taken and reserved at the trial; so that this court is in the same situation as the judge who tried the cause, and is now called on to decide whether the allegations in the declaration are supported by the proof. Upon a careful consideration of the case, I am of opinion that the objection ought to have prevailed at nisi prius, and therefore that this rule should be made absolute. The question which arises on the first three counts depends on section 47 of 7 & 8 *Geo.* 4. c. 29. The former act, 39 *Geo.* 3. c. 85., was also properly referred to, as illustrating the present law of embezzlement, by reciting the description of mischiefs which was then intended to be repressed. It is singular that the words “body corporate or politic,” in 39 *Geo.* 3. c. 85., should have been omitted in “the existing act; however, there is no doubt that clerks or servants to such bodies would be held to be included in its general words. The question here is, whether this plaintiff is such a clerk or servant, or person employed in the capacity of either? And looking at the nature of his employment, as proved, and the various decisions on the subject which have been cited, to which *Rex v. Nettleton* (a) might be added, I should say that he certainly is not a servant to the mayor and corporation or the commoners; for what controul have they or any

(a) Ry. & M. 259.

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other person over him? Not only is it not shown that any person could call on him to pay over any money he may receive as soon as it is received, but it is shown that he had an indefeasible right to retain it during his year of office. That right is wholly incompatible with the situation of clerk or servant.

As to the other counts, I am of opinion that the inuendo should be read as a substantive allegation in the declaration, which requires proof accordingly, and cannot be rejected. This is a very different case from those where, on questions originating for the first time after verdict, in cases where the words afford a clear cause of action without any inuendo, a bad or repugnant inuendo has been rejected as surplusage. For the question here is, as it was at *nisi prius*, one of evidence, viz. not whether the inuendo is bad, but whether, not being shown to be other than good, it is proved. Then as the plaintiff, by not bringing himself within the statute as a clerk or servant, made it impracticable to prove a material allegation in his declaration, the consequence is, that as he might have been nonsuited at the trial, so this rule must be made absolute for entering a nonsuit.

BOLLAND B. was at chambers.

GURNEY B.—It is quite unnecessary for me to add more than my concurrence.

Rule absolute.

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A Rule to change the venue had been obtained after plea pleaded on a special affidavit, by which it appeared that all the witnesses lived in the county to which it was proposed to change the venue. Cause was shown that the application was too late. But,

If a motion to change the venue rests on special grounds, it ought not to be made till after plea pleaded.

Per BAYLEY B.—That would be so if the application rested on the ordinary affidavit, but this motion being made on special grounds, ought to be made after plea pleaded, because it cannot be previously known what issue is to be tried.

Milner for, *R. V. Richards* against the rule.

IN THE EXCHEQUER CHAMBER.

GARLAND *against* CARLISLE, Assignee of LEONARD, a Bankrupt.

(In Error from the Common Pleas.)

Before DENMAN, Chief Justice, and LITLEDALE, PARKE, and TAUNTON, Justices of K. B.—BAYLEY, VAUGHAN, BOLLAND, and GURNEY, Barons of Exchequer.

AS the special verdict was stated at length by Mr. Baron Gurney in his judgment, it will be sufficient to mention that this was an action of trover by the assignee of *Leonard*, a bankrupt, for goods seized by *Garland*, the defendant below, as sheriff of *Dorset*, under a *fi. fa.* issued by *Payne* against *Leonard* after an act of bankruptcy committed by the latter. A special verdict was found at *Dorchester* summer assizes 1826, the substance of which appears to be, that the bankrupt's goods seized by the sheriff were packed up upon the premises while the sheriff was in possession, but that

Whether a sheriff, who in obedience to a *fi. fa.* seizes the goods of a person who has committed an act of bankruptcy previously to issuing the execution, is liable in trover by the assignees of the latter,—*Quere.*

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the plaintiff *Payne* subsequently agreed to abandon the execution on receiving goods instead of money. To that arrangement the sheriff, by his agent specially authorized for the purpose, assented; the execution was wholly abandoned, and the goods were thereupon sent to the plaintiff *Payne* as packed. Afterwards, and before the commission issued, a portion of *Leonard's* goods, worth 5*l.*, was sent by the under-sheriff's agent to the sheriff's officer, to hold till the poundage and expenses of levy &c. were paid him by the plaintiff *Payne*. That payment having been made after the commission issued, those goods were also sent to the plaintiff by the officer.

On the argument of the special verdict in C. P. it was contended for the assignee, that if there was a conversion of the goods by the sheriff, he was liable in trover to the assignees under the commission issued on an act of bankruptcy committed prior to the levy, whether he knew of the bankruptcy or not; *Lazarus v. Waithman* (a), *Price v. Helyar* (b). The facts showing a conversion were then insisted on.

For the sheriff, after it had been contended that the facts in evidence did not prove a conversion by him, it was intimated that if they did, it was not proposed to argue the question of his liability in that court, it having been so recently decided there in an adverse manner.

The court were of opinion that a conversion by the sheriff was established, supposing the sheriff to be liable in trover. They intimated that any further discussion of the latter point should take place in a court of appeal, and held, that the sheriff having received the benefit of the 5*l.* parcel of goods in discharge of his poundage, and having been instrumental and assenting to the packing up the others, must be considered a principal in the transaction. Judgment for the plaintiff (c).

(a) 5 B. M. 313.

(b) 4 Bing. 597.

(c) 7 Bing. 298.

A writ of error having been brought, the point of the sheriff's liability in trover was most elaborately argued, in the vacation after *Trinity* term, by

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F. Pollock for the sheriff, as plaintiff in error, and *Bompas* Serjt. for the assignee, as defendant in error; but the great length and minuteness of the judgments render it unnecessary to detail their arguments here.

The Court took time to consider, and

On the 26th *November* the learned Judges proceeded to deliver their judgments *seriatim*.

GURNEY B.—This was an action of trover by *Thomas Carlisle*, assignee of the estate and effects of *George Valentine Leonard*, a bankrupt, against *George Garland*, late high sheriff of the county of *Dorset*, in which the jury have found the following special verdict.

That the within-named *George Valentine Leonard*, at the time of the committing of the act of bankruptcy and the issuing of the commission hereinafter mentioned, was a trader within the intent and meaning of and subject to the statutes made and then in force concerning bankrupts, and that there was then a good petitioning creditor's debt. That the said *George Valentine Leonard*, on the 15th *October* 1824, committed an act of bankruptcy. That on 15th *Dec.* in the same year a writ of *fi. fa.* issued out of his majesty's court of K. B. tested the last day of *Michaelmas* term preceding, returnable on *Monday* next after eight days of *St. Hilary* then next, and directed to the sheriff of *Dorset*, commanding him that of the goods and chattels of the said *G. V. L.* he should cause to be levied as well a certain debt of 604*l.* which *Joshua Payne* had recovered against him in the court of K. B., as also 65*s.* for his damages, as well by reason of the detain-

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ing of that debt as for his costs and charges; which said writ was indorsed to levy 30*l.* 1*s.* 6*d.* besides sheriff's fees, poundage, officer's fees, and all other incidental expenses.

That on the 16th day of the said month of *December* the said writ was delivered to Mr. *William Parr*, at that time under-sheriff to the defendant, who was then sheriff of *Dorset*, by *John Williams*, an agent of the said *Joshua Payne*, together with a letter from *Green & Ashurst*, his attornies; a copy whereof is as follows:—

“ *Sambrook Court, Basinghall Street, December 15, 1824.*

“ SIR,—The bearer, Mr. *Williams*, will deliver a writ of *fi. fa.* to you, which we have issued against the goods of Mr. *Geo. Valentine Leonard*, and upon which you will be pleased to grant a warrant to an officer living near to *Lyme*. We authorize you and the officer to take Mr. *Williams*'s directions on the subject of this execution, and to withdraw from possession if he shall think fit to request you so to do. We are, &c.

“ Mr. *Parr*. *Green & Ashurst.*”

And on the 17th of that month the defendant issued his warrant, directed to *William Restarick*, his bailiff, reciting the said writ, and commanding him to levy of the goods and chattels of the said *George Valentine Leonard*, as required by the said writ, that the said sheriff might have the money as by the same he was commanded. That the said warrant was delivered by the said *John Williams*, the agent of the said *Joshua Payne*, to the said *William Restarick*, together with a letter from the said *William Parr*, as under-sheriff as aforesaid, to the said *William Restarick*; a copy of which is as follows:—

“ *Poole, December 16, 1824.*

“ *Payne v. Leonard.*

“ SIR,—Enclosed is a warrant to levy on the defend-

ant's property, which I send you by Mr. *Williams*, whose directions you will take in the execution of the warrant; and if he requests you to withdraw the execution, you will do so on his giving you a written authority.

William Parr."

Who afterwards, on the 17th day of *December*, in the year last aforesaid, entered the said *G. V. Leonard's* house and premises at *Lyme*, in the county of *Dorset*, and there seized and took divers goods in the declaration mentioned, which were the goods of the said *G. V. L.*, but which by the subsequent commission of bankrupt and assignment became the property of the plaintiff by relation from the act of bankruptcy, of the value of 450*l.*, under and by virtue of the same writ, putting *Robert Gascoigne*, his assistant, in possession, and leaving with him the warrant, and kept possession of the same till the 24th day of the same month.

That whilst said *Robert Gascoigne* was so in possession as the assistant of the said *William Restarick*, divers goods, parcel of the said goods in the said declaration mentioned, of the value of 445*l.*, which were the goods of the said *G. V. L.*, but which by the subsequent commission of bankruptcy and assignment became the property of the plaintiff by relation from the act of bankruptcy, were made up into 13 packages, which the said *William Restarick* understood were packed for the purpose of satisfying the levy, in pursuance of an arrangement made between the said *John Williams* and the said *G. V. L.*, eight of them to pay the debt due from the said *G. V. L.* to the said *Joshua Payne*, and the remaining five to be sold by the said *Joshua Payne* for the sheriff's poundage, officer's fees, and other expenses which the said *John Williams*, as such agent, should have incurred or might incur in and about the said levy; the surplus balance to be remitted to the said *G. V. L.*

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The greater part of these goods had been originally purchased by the said *G. V. L.* of the said *J. P.*, but some few of the goods so purchased having been sold, the value of them was made up out of the said *G. V. L.*'s stock; but the said *J. P.* had not by his arrangement any more than his just debt.

That after such arrangement had been so made between them on the 24th of the same month of *December*, the said *John Williams*, agent for the said *J. P.* delivered to the said *William Restarick* two letters, one dated the 23d day of *December*, signed by the said *G. V. L.*, and directed to the said *William Restarick*, as follows:—

“ I request and empower you to take goods instead of cash to the amount of the levy in the above cause.”

And the other dated *Lyme*, 14 *December* 1824, signed by the said *John Williams*, as follows:—

“ I hereby authorize and request you to quit possession, the plaintiff having been satisfied the whole debt and costs in this action.”

The said execution was afterwards, on the said last-mentioned day, wholly abandoned, and the said *Robert Gascoigne* and the said *William Restarick* quitted the premises of the said *G. V. L.*, leaving all the said goods therein; the said *Robert Gascoigne* going to *Bridport* and taking the said warrant with him, and the said *William Restarick* to the *Cups* inn at *Lyme*.

That two hours after, the said *John Williams*, the agent of the said *Joshua Payne*, came to the said *W. Restarick* at the *Cups* inn to settle with him for the sheriff's poundage, and his the said *W. Restarick*'s expenses for inventory, holding possession, levying and other expenses, which was done, and was the first time they had been adjusted; and the said *John Williams* paid to the said *W. Restarick* the whole thereof except 5*l.* which he did not pay; he the said *John Williams*

and the said *W. Restarick* agreed that the said *John Williams* should cause goods to the amount of 5*l.* to be packed up and sent to the said *W. Restarick*, to be deposited with and kept by him till the said 5*l.* should be remitted to him.

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That a quantity of goods of the value of 5*l.*, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the said bankrupt by a shopman of the said bankrupt, and sent to the *Cups* inn, and was afterwards on the following *Monday*, 26th *December* in the same year, received by the said *W. Restarick* at *Bridport* by the *Lyme* carrier.

That the said 5*l.* was about two months after paid to the said *W. Restarick*, who forwarded the said package of goods, about the same time that the money was paid, by the van to *London* to the said *Joshua Payne*.

That the said *W. Restarick*, at the same time he received the same quantity of goods, knew that they were part of the goods which had been so seized as aforesaid.

That the said 13 packages of goods were, after the said execution so abandoned as aforesaid, on the said day sent by the said *John Williams*, as such agent as aforesaid, from the said house and premises of the said *G. V. L.* to the *Cob* at *Lyme*, each of them being marked with the letters *J. P.* being the initials of the said *Joshua Payne*'s name, and thence shipped for *London*, addressed *J. P. Carpenter Smith*'s wharf, and were directed by the said *John Williams* to be sent to 34, *Old Change*, for *Joshua Payne*.

That they were sent, together with four other packages of goods which had been sent to the *Cups* some days before the execution, and are not the subject of the present action, making 17 packages of the whole; that they were landed on their arrival in *London* at *Car-*

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penter Smith's wharf, whereof Richard Wilson was the wharfinger. That on the 8th January 1825 a commission of bankruptcy issued against the said G. V. L., under which he was on the 14th of the same month declared a bankrupt.

That on the 29th of the same month an assignment of the estate and effects of the said bankrupt was made by the commissioners under the said commission to the said plaintiff. That in the beginning of *February 1825*, Mr. *Henry Ball* asked the said *Richard Wilson*, if he would deliver the said seventeen packages of goods to him, who said "certainly not, until it was ascertained in a court of law to whom they belonged;" and they still remain in the said wharf in his possession. That on the 15th *June 1825*, at *Poole* in *Dorsetshire*, the said plaintiff demanded the goods mentioned in the declaration of the said defendant, who referred him to Mr. *Parr*, his under-sheriff. That the said plaintiff soon after seeing the said defendant and the said Mr. *Parr* together at *Poole* in the said county of *Dorset*, asked Mr. *Parr*, in the presence of the said defendant, whether it was his the said Mr. *Parr's* intention to comply with the terms of the same demand, or not? to which the said Mr. *Parr* answered, "No, certainly not."

Upon this special verdict the court of Common Pleas has given judgment for the plaintiff, and the defendant has brought this writ of error to reverse that judgment. The point on which this question turns has lately undergone the consideration of the court of Exchequer in the case of *Balme v. Hutton*, and of this court, composed of the judges of the courts of K. B. and C. P. in the same case, on a writ of error from the judgment of the court of Exchequer, in which case the judgment of that court was reversed, upon the opinion of six of the judges, my

brother *Gaselee* dissenting from them, and adhering to the opinion of the court of Exchequer. Differing, as I must, from great authorities, on which side soever I form my opinion, I have considered the question most anxiously—I have examined every case upon the subject again and again—I have read and deliberated on the judgment of the court of Exchequer pronounced by Lord *Lyndhurst*, and also the several judgments pronounced by my learned brothers in this court—I trust I feel the diffidence which I ought under these circumstances to feel in forming any opinion upon the question. Yet I must deliver the opinion which in the result I have formed, and in which I have been much assisted by the ample and able discussion which this question has undergone. That opinion is in favour of the defendant in error.

It is difficult, if not impossible, to add any thing to the arguments of the several learned judges upon this subject with whom I agree; I will however briefly state the grounds of my opinion. As this is a question arising on an act of parliament, it is requisite first to look at the act itself. The statute of 13 *Eliz.* c. 7, empowers the Lord Chancellor, by commission under the great seal, to appoint persons who shall have full power and authority to take such order and direction with the body of the bankrupt, as also with his land, and also with his money, goods, chattels, wares and merchandizes, and debts, wheresoever they may be found or known, and cause them to be appraised to the best value they may, and to make sale of the same, or otherwise to order the same for the true satisfaction and payment of the creditors." This is a plain, clear, distinct enactment. The first question is, what is the property of the bankrupt respecting which the commissioners are to take order? The answer, it appears to me, must be the property which the bankrupt had at the time he became so.

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The fact of his being bankrupt is not publicly known at the time it takes place. It is ascertained at a subsequent period. A commission issues, adjudication is made, assignees are appointed. To them the bankrupt's property is assigned, and their title to the bankrupt's property relates back to the time of the bankruptcy. There is no period, short of the bankruptcy, which can be predicated as the commencement of their title. It cannot be necessary to cite cases to establish a principle which is so well settled and acknowledged. This relation is absolutely necessary for the prevention of fraud. Unquestionably this often produces great hardship to individuals. If that were not known when the statute passed, it has become known in a thousand instances since, and in particular cases the application of the rule has been restrained, not by the courts of law, but by the legislature. Where exceptions have not been introduced, the rule has been considered as inflexible. If the assignees have therefore a title to the property of the bankrupt, it appears to me to be a necessary consequence that they must be intitled to follow that property whithersoever it goes, and must have a right of action against any person who converts it, otherwise it is impossible that they can make due distribution among the creditors. It is admitted that this is so with respect to the judgment creditor. But it is said that this being an action against the sheriff rests upon a different principle. In this case, at a period when the fact of the bankruptcy was not known (although it had taken place), the defendant, the sheriff, who was commanded to take the goods of *Leonard* the bankrupt, took goods which had belonged to *Leonard*, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee, and converted them by handing them over to the judgment creditor. The

defendant contends that he is not liable to this action of trover because he is a public officer; that he was called upon to execute the process of the law, and that at the time he executed it he had no reason to doubt that the goods which he found in the possession of *Leonard* were his property. I admit the hardship, and regret that it exists, but the legislature has not made any exception in favour of a public officer under these circumstances, and I think that a court of law cannot supply that omission. This is the best opinion that I can form upon the act of parliament itself, and this would be my judgment were the case *res integra*.

The next question is, whether this act of parliament has in all times received a contrary exposition. If an act of parliament more than two centuries old has received one uniform construction, it would perhaps be more safe to yield that construction (even though it should not be quite satisfactory) than by making a change to unsettle the opinions and the practice of the profession and of the public. But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance from my own conviction. On the contrary, I find the cases and the practice, for a period of nearly 80 years, in favour of the construction which I have given, and the older cases, upon which reliance is placed for the opposite construction, appear to me to be of doubtful authority. The first case which is relied upon in the judgment in the court of Exchequer is that of *Bailey v. Bunning* (a). This case is very imperfectly and confusedly reported. It was an action of trover, yet if we can trust the reports the discussion which took place would rather have induced the supposition that it had been considered an action of trespass: the finding of the jury indeed appears to have proceeded upon that

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(a) 1 Lev. 191; 1 Sid. 271; 2 Keble, 32, 33.

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supposition, for they submit the question to the court upon the *taking* by the defendant, which would have been the question if the action had been trespass, but certainly was not the question where the action was trover.

At the time that the case of *Balme v. Hutton* was before the court of Exchequer, it was supposed that the jury in *Bailey v. Bunning* had found the conversion. The *postea* had not then been transcribed, and the court had no other information respecting it than the reports afforded. But before the case came on in this court upon the writ of error, the *postea* was transcribed, and it then appeared that although the jury found both the demand and refusal, they did not find the conversion (a). Now the demand and refusal, although evidence of conversion, do not amount to conversion. That omission the court could not supply, and it was expressly found that the goods remained in the hands of the sheriff. Consistently with the opinion which leads me to give judgment in favour of the defendant in error in this case, I should have had no difficulty in giving judgment for the defendant in that. Considering the actual finding of the jury, the discussion that took place, and the imperfect reports with which we are furnished, I cannot but think that much more importance has been ascribed to this case than it deserves.

The next case is *Lechmere v. Thorogood*, 3 Mod. 236, and which came on again as reported in 1 Show. 12. That was an action of trespass, and all that the court was called on to decide was, whether trespass would lie, and they held that it would not. I agree entirely with the decision in that case, that trespass would not lie. The bankrupt could not bring the action, for his property in the goods had ceased. The assignee could not bring the action, because possession

(a) See ante, Vol. II. 622 n.

real or constructive is necessary to sustain an action of trespass, and he had neither. The property of the assignee related back, because the statute had given it to him, but the statute had not given a relation of possession. An action of trover was afterwards brought, and the plaintiff again failed; and *Shower* in his report says, it was decided that having brought trespass, and being defeated, trover could not afterwards be maintained by him. Another reporter says the case was adjourned; but it is probable that *Shower* was right, because he speaks with some exultation on his poor widow having been quit of them at law in both courts. The court did not decide that trover could not have been maintained if that had been brought first. Whether the court decided rightly that the judgment for the defendant in the trespass was a bar to the action of trover, it is not necessary to inquire. But why an action of trover for converting the property of the assignees on the 1st of *February* should not be sustainable, because it had been decided that an action of trespass for entering and taking those goods upon the 1st of *January* could not be sustained, I confess that I cannot see. The evidence in the one case would be materially different from the evidence in the other.

The next case is *Cole v. Davies* (a), which at best is but a nisi prius case. Its authority is materially detracted from by the observation of Lord *Mansfield* in *Cooper v. Chitty*, that it was one of those notes which were taken by Lord *Raymond* when he was young, as short hints for his own use, but too incorrect and too inaccurate to be relied on as authorities. And if Lord *Raymond* in taking his note omitted but two words, the law laid down will be unquestionable. If Lord *Holt* said, (as probably he did say) not that no action

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(a) Ld. Raym. 724.

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will lie, but that no action of *trespass* will lie against the sheriff, because he obeyed the writ, then this case will not be inconsistent with what I conceive to be the law. These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt under a warrant to levy on the goods of the bankrupt.

The last of those cases occurred in the year 1698, and there does not appear to be any thing to fill up the chasm between that case and the case of *Cooper v. Chitty*, which was in the year 1756, immediately after Lord *Mansfield* had taken his seat as chief justice of the court of K. B.

It has, in the consideration of this question, excited some surprise in my mind that the case of *Cooper v. Chitty* should have raised so much doubt as to induce the court to call for a second argument; but we learn from Sir *James Burrow* that second arguments were at that time much more common than they have been since; and that they were allowed, if pressed for by counsel, even though the court themselves entertained no doubt.

The case of *Cooper v. Chitty* was very fully argued, the court took time to consider, and Lord *Mansfield* pronounced an elaborate judgment (a).

Sir *James Burrow*'s report of the judgment upon the general question of law, and the distinction between trover and trespass, is as follows. "The general question is, whether or no the action is maintainable by the assignees against the defendants, the sheriffs, who have taken and sold the goods. It is an action of trover. The bare defining the nature of this kind of action and the grounds upon which a plaintiff is en-

(a) 1 Burr. 20; Kenyon, 395; 1 Bl. 65.

titled to recover in it, will go a great way towards the understanding, and consequently towards the solution of the question in this particular case. In form it is a fiction; in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases where in truth the defendant has got possession lawfully." "Hence (he adds) if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it. This is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action. 1st., Property in the plaintiff; and 2dly, A wrongful conversion by the defendant. "As to the first, it is admitted in the present case that the property was in the plaintiffs, as on and from the 4th of December (which was before the seizure) by relation. This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes consider him as a criminal.) They make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy. Dispositions by process of law are put upon the same foot with dispositions by the party. To be valid they must be completed before the act of bankruptcy.

Till the making of 19 *Geo. 2. c. 32.*, if the bankrupt had *bonâ fide* bought goods or negotiated a bill of exchange, and thereupon or otherwise in the course of

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trade paid money to a fair creditor after he himself had committed a secret act of bankruptcy, such bonâ fide creditor was liable to refund the money to the assignees, after a commission and assignment, and the payment, though really and bonâ fide made to the creditor, was avoided and defeated by the secret act of bankruptcy. This is remedied by that act in case no notice was had by the creditor, (prior to his receiving the debt) that his debtor was become a bankrupt, or was in insolvent circumstances. Therefore as to the first point, it is most clear that the property was in the plaintiff as on and from the 4th of *December*, when the act of bankruptcy was committed.

2dly, The only question then is, whether the defendants are guilty of a wrongful conversion. That the conversion itself was wrongful is manifest. The sheriffs had no authority to sell the goods of the plaintiffs, but of *William Johns* only. They ought to have delivered these goods to the plaintiffs, the assignees. Upon the foundation of the legal right the chancellor even in a summary way would have ordered them to be delivered to the assignees. It is admitted on the part of the defendants that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that *Godfrey* the plaintiff would have no title to the money arising from such sale, but if he received it, would be liable to an action to refund. If the thing be clearly wrong, the only question that remains is, whether the defendants are excusable, though the act of conversion be wrongful.

Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees by relation in order to an equal

division of his estate among his creditors, yet they do not make men trespassers or criminal by relation who have innocently received goods from him, or executed legal process not knowing of an act of bankruptcy. That was not necessary and would have been unjust.

The injury complained of by this action for which damages are to be recovered, is not the seizure but the wrongful conversion. The sheriff acts at his peril, and is answerable for any mistake; infinite inconveniences would arise if it were not so."

Lord *Mansfield* then adverts to the cases of *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, and observes,

"The fallacy of the argument from the authority of these cases turns upon using the word 'lawful' equivocally in two senses. To support the act it is not lawful. But to excuse the mistake of the sheriff through unavoidable ignorance it is lawful; or, in other words, the relation introduced by the statutes binds the property; but the men who act innocently at the time are not made criminals by relation, and therefore they are excused from being punishable by action or indictment as trespassers; what they did was innocent, and in that sense lawful. But as a ground to support a wrongful conversion by sale after a commission publicly taken out, and an actual assignment made, it was not lawful." He afterwards says,

"As to the case of *Cole v. Davies* and another, reported in 1 Lord *Raymond*, 724, that no action will lie against the sheriff, who after the bankruptcy seizes and sells the goods under a fi. fa. to him directed, (which is there said to be ruled by Lord Chief Justice *Holt* at nisi prius,) these notes were taken in 10 *Will.* 3, when Lord *Raymond* was young, as short hints for his own use. But they are too incorrect and inaccurate to be

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relied on as authorities." After examining that case he continues,

"There are much greater hardships upon other third persons concerned in pecuniary transactions with bankrupts, which hardships they are nevertheless left subject to, because it was necessary that they should be so in order to secure the end and intention of the act relating to bankrupts, namely, the securing their effects for the equal satisfaction of their creditors."

The judgment of Lord *Mansfield* upon this head, as reported by Lord *Kenyon*, is to be found in the first vol. p. 416.

"The general question is, whether this action is maintainable by the assignees against the defendants, the sheriffs. The action of trover is in form a fiction, but in fact and substance a remedy given the subject to recover a personal property. The very form of the count supposes that the defendant may come lawfully by the possession of the goods, and wherever a defendant gained such possession wrongfully, the plaintiff, by bringing [this action, waives the trespass, so that if on demand the defendant delivers the thing to the plaintiff, no damages can be recovered in this action. It is called in our law an action of tort, but the conversion is the whole tort. Two things are necessary for a plaintiff to prove in this action, first, property in himself; secondly, a wrongful conversion by the defendant.

In the present case it is admitted, that the property of these goods was by relation in the plaintiffs, as 'on and from the 4th of *December*,' which was before the seizure, and was most notoriously in them on the 8th, when the assignment was made, which was long before the sale. This property by relation assignees derive under divers acts of parliament, whereby bankrupts are

divested of their property from the time of the act committed. They make the assignment good against all who claim by, from, or under the bankrupt after the bankruptcy committed, and it is good against all executions not executed before the act of bankruptcy, and the disposition of the law is in the same condition as the disposition of a private person.

Before 19 *Geo. 2.*, if a bankrupt had bought bills of exchange or goods after the act of bankruptcy committed, and paid money for them, the seller was liable to refund this sum to the assignees, but this is remedied by that statute, though still, if the party had notice, the relation shall stand.

If a bankrupt sells goods and receives the money, the sale is void, and all acts are rescinded from the bankruptcy committed: these statutes vesting the property in the assignees, do not however make purchasers trespassers to the assignees, so as to be subject to an indictment or action of trespass, for they act innocently.

Nothing then can be clearer than that the property was in the plaintiffs before the writ of *fi. fa.* was executed, so that the only question is, whether the defendants are guilty of a wrongful conversion? and that may be considered in two lights.

1st. Whether the conversion itself be wrongful?

2d. Whether the defendants are excusable?

As to the first, that the conversion is wrongful is manifest. The defendants had no authority to sell the goods of a third person, and these goods ought to have been delivered up to the assignees. I have known applications in Chancery above an hundred times for sheriffs to return the goods or pay the money. That the act was injurious appears clearly from this, that the vendee could have no title, for a sale

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cannot be lawful which gives no title to the purchaser. In this case an action would lie against the purchaser. The end for which the goods are sold is, that the money may be paid to the plaintiff in the original action; here it was making a sale which could not stand, and applying the money to him who cannot hold it. The only question, as I said before, here is, upon the tortious conversion; for the action supposes a rightful possession; so that it is very clear that the plaintiffs are entitled to judgment.

Lord *Mansfield* then considers the argument for the defendant, and the cases of *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, which had been cited, and observes, "The mistaking those cases arises from the imperfection and abuse of words. Those cases determine that the taking the goods is lawful. If lawful, it was argued that the execution was well begun and must be completed. But how was the seizure lawful? Is it meant that it was lawful as against the assignees, or in any sense to change the property? Clearly not, for the assignees will pursue and avoid every disposition, even in market overt. No more can be meant than this: that the sheriff not knowing anything of the secret act of bankruptcy or that any commission would ever be taken out, shall not be punished as a wrong-doer for the taking, which, though not lawful against the assignees, yet was innocent and excusable. All the other cases do but follow that of *Bailey v. Bunning*, in which there was a long question about the relation of the teste, and besides that another, namely, whether the taking was lawful.

The court, in determining it, plainly considered no more than whether the defendant was a trespasser or not, and they all agreed that what he had done was lawful, for he being an officer was obliged to execute

the writ, not knowing of the act of bankruptcy or that a commission would be ever taken out. In the case of *Phillips v. Thompson* (a), it appears that the case of *Bailey v. Bunning* was resolved only in excuse of the bailiff for executing the writ. The same case is reported in *Sid.* very shortly, and the reporter seems to have been confused and not to distinguish between the cases of trover and trespass.

The next case is that of *Lechmere v. Thorogood in Show.*, which was trespass against a sheriff for taking the goods of the assignees; and it was resolved, that though the statute of bankruptcy vest the property in the assignees, yet that relation shall not work so as to make officers who had a good authority, and took the goods lawfully, trespassers; and so is the case of *Bailey v. Bunning*.

This case of *Lechmere v. Thorogood* is reported in two other books. In *Comb.* 123, the latter part of the case is agreeable to this of *Show.*, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about, for he makes Lord *Holt* say, what he would never say, about barring the extent of the crown. In *3 Mod.* it is as plain that the reporter misunderstood what passed; for he says the extent came too late, and that the property was bound by the *fi. fa.*, though the contrary is very clear.

Then as to the case of *Cole v. Davies*, Lord *Raymond* was very young when he took his note of it, which is very short. It was an action against the assignees; but there is no state of the case, nor of any one fact in it; but this much appears that is not applicable to the present case, as it is an action against the assignees. From the fourth resolution in that

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case it seems that there must have been a sale by the sheriff before the act of bankruptcy committed to a person who suffered the goods to remain in the bankrupt's possession, and that the assignees had seized the goods, looking upon the sale as fraudulent. It is there said to be resolved, that if *A.*'s goods are seized on a *fi. fa.*, and sold to *B.*, though *B.* permits *A.* to keep possession &c. it will not make the execution fraudulent, nor will a subsequent act of bankruptcy defeat it.

I should have doubted on the very point there resolved, but be that as it may, it is no way applicable, and all the rest are only obiter opinions, referring to something as known law before, and not necessary to the determination of that case.

These are all the authorities cited, and they are clearly answered by stating with precision the grounds they went on. Another topic was insisted upon, that it would be extremely inconvenient if the sheriff was not allowed to sell, after assignment, goods taken before; for to part with the goods again and return *nulla bona*, he must take upon him to prove the change of property. Arguments *ab inconvenienti* are to be attended to. Let us consider, therefore, how this case stands in this respect. The sheriff by law is obliged, at his peril, to know the property of all other persons, and yet has not the same means of coming at that knowledge, as in the present case. Besides, if there were any doubt about the time of the act of bankruptcy, or of the assignment &c., I will not say how far the court would indulge the officer to make his return, or oblige the plaintiff to take the question on him, but he might take an indemnity, or petition under the commission, or file a bill of interpleader, which would not cost him a penny.

This relation is certainly often very hard on third persons, but a case can rarely happen where it will be so to a

sheriff. The legislature, however, have established it, not thinking that it may not be hard in particular cases, but to prevent that inundation of fraud which would otherwise be the case if bankrupts were at liberty to place their goods in the hands of other persons, by giving judgments or the like. The sheriffs ought to look to it, and might fairly have insisted on an indemnity. To establish the doctrine contended for on behalf of the defendants, would be driving assignees to an application to courts of equity to prevent collusion between bankrupts and sheriffs." This note of Lord *Kenyon* reports the judgment of Lord *Mansfield* with great perspicuity."

It is justly observed, that the facts in *Cooper v. Chitty* differ materially from the facts in this case. In *Cooper v. Chitty* the bankruptcy had happened, and was known at the time of the conversion by the sheriff. I admit, that on that account the judgment is not to be relied on absolutely as an authority in this case, particularly as it appears from other parts of the report that Lord *Mansfield* fortified his judgment by the peculiar facts of that case; yet the principle of law which he laid down, goes the whole length of the principle necessary to be established in this case, to warrant a judgment for the plaintiff, and the reasoning which he employed well sustained it. And I cannot but think that that reasoning made its due impression upon the profession, for it cannot be doubted that soon after that period the prevailing opinion of the profession was, that the sheriff would be liable to an action of trover at the suit of the assignees, provided the conversion was overreached by the act of bankruptcy.

In the case of *Lazarus v. Waithman*, Mr. Justice *Burrough* says the point was settled long before he knew *Westminster Hall*, (Mr. Justice *Burrough* was called to the bar in 1773, only 17 years after the case

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of *Cooper v. Chitty* was decided). This observation of Mr. Justice *Burrough* is illustrated by the case of *Kitchen v. Campbell*, 3 *Wilson*, 304, reported as *Hitchin v. Campbell*, 2 *Blackstone*, 779 and 827, which occurred in the year 1772. Although the principal question was, whether the assignees could sustain an action for money had and received after having failed in an action of trover, yet the opportunity was taken for promulging the law upon this very point. In the report in *Blackstone*, Chief Justice *De Grey* is stated to have said, in giving the judgment of the court, "The legal effect of an act of bankruptcy, committed by a trader, is to put it in the power of the commissioners by relation to divest the property from that time, in case a commission be afterwards issued; this relation takes place in every instance but three, excepted by statutes 1 *James* 1., 21 *James* 1., and 19 *Geo.* 2. Executions are not among these excepted cases, but are expressly declared void by stat. 21 *Jac.* 1., the commission being in the nature of an execution for the whole body of creditors. By the old acts of *Hen.* 8. and *Eliz.*, commissioners had a power of acting themselves in recovering the bankrupt's effects, afterwards it became the practice to assign, which is allowed by 1 *Jac.* 1. c. 15. It was not till the 5 of *Anne* that assignees were directed to be chosen, which was revived by 5 *G.* 1. Yet notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued: so ruled in *Lechmere v. Thorogood* in *Comberbach* and *Shower*, and in *Cooper v. Chitty* (a). But by selling, the sheriff converts the goods, and trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action."

This case, in which the law as laid down in *Cooper v. Chitty* was thus again pronounced, distinctly recognized,

(a) 1 Burr. 20.

and standing, as it has done, till lately unquestioned, affords the strongest evidence that in the opinion of all the judges who have sat in *Westminster Hall* since that time, the question was settled. Every case that has occurred till we come to the case of *Balme v. Hutton* has been in conformity with this judgment.

Very many cases have occurred at nisi prius in which this doctrine has been held and acted upon, and no motions made for new trials on the ground of misdirections, because this has been the general opinion of the profession. In the case of *Lazarus v. Waithman* (a), the attention of the court of Common Pleas was called to that point, and although the earlier cases were not distinctly brought under their consideration, yet the experience of every one of the judges must have supplied them with cases in abundance, and I see no reason to conclude that those earlier cases would have affected their judgment. Against all this we have nothing but the plea of hardship. It is undoubtedly true that it is a hardship upon the sheriff that he should be liable to an action of any kind where he has acted in ignorance and bonâ fide. But it is part of the infirmity of human legislation that the general rule which it prescribes will work hardship in particular cases, and it is for the legislature to afford such relaxation of the rule as can be done with safety. This has been done from time to time with regard to this rule of relation, but the legislature has not relaxed it so far as to give relief to the sheriff in this case.

The sheriff is exposed to other risks, where he acts equally bonâ fide. The office is an office of risk and liability, but it is not an office of unmixed risk and liability; the sheriff receives remuneration for his risk, as well as his trouble. And he cannot take the remu-

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neration and shake off the liability. If he thinks that the risk is disproportioned to the remuneration, let him apply to the legislature for relief; his risks have been materially lessened by the legislature, his profits have not been abridged.

There is not any case of hardship upon the sheriff, under the bankrupt law, which can be compared with the case of *Glasspoole v. Young* (a), which was an action of trover against the sheriff. The plaintiff, then a widow, had intermarried with one *Mearing*, the goods in question, at the time of her marriage, were her property. In the course of the next year a judgment on a warrant of attorney was entered up against *Mearing*, and a writ of fi. fa. issued, under which the sheriff seized the goods in the house where *Mearing* and the plaintiff lived together as man and wife. The plaintiff believed herself to be his wife, an application was made to set aside the execution for some supposed irregularity, in which she made an affidavit as his wife. Two years afterwards she discovered that he had a former wife living, she brought an action of trover against the sheriff, and recovered the value of the goods which he had taken. There was in that case every ingredient that could constitute a case of *bonâ fides* in the sheriff, and of hardship in his being thus called upon long afterwards to pay the value of the goods which he had seized and sold; but the law was inflexible. Under a warrant to take the goods of *Mearing*, the sheriff had taken the goods of *Glasspoole*, and the court of King's Bench held that he was liable.

I do not know that the hardship upon an officer who is well paid for his risk, is greater than that of many other persons upon whom the operation of the bankrupt laws is found to press, and upon whom they formerly pressed still more heavily. The preambles

(a) 9 Barn. & Cress. 696.

to the early statutes show the unceasing jealousy of the legislature as to the frauds of bankrupts, and one after the other recites the difficulty of keeping pace with the secret frauds and contrivances which were resorted to to defeat their creditors. Possibly it was owing to that, that the relation back of the title of assignees was long allowed to prevail to an extent which worked great injustice. Nevertheless the courts of law contented themselves with expounding the law as they found it, and the repeated amendments which it has received from the legislature. The statutes of 1 Jac. 1. c. 15., 21 Jac. 1. c. 19., 19 G. 2. c. 82., 46 G. 3. c. 65., have all been passed to relieve persons from the hardship occasioned by the application of this principle, the relation back of the property of the assignee; and during the pendency of this cause, the interpleader act has extended the protection which before was given to the sheriff. Upon the whole I am of opinion that the judgment of the court of Common Pleas is right, and ought to be affirmed.

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TAUNTON J.—I concur in opinion with my brother Gurney. The main point in this case closely corresponds with that in *Balme v. Hutton* (a), lately argued in this place. I see no reason for departing from the opinion which I then expressed, after an attentive review of the authorities. I will add thus much, that I dread the consequences of a decision by this court in favour of the plaintiff in error. Certainty is of the first importance to the judicial proceedings of courts of justice; and the decisions during a period of sixty years ought not to be disturbed by fanciful innovations

(a) The reporter takes the opportunity of acknowledging with regret the mistake of entitling this case in error, in Vol. II. 620, as *Hutton and Others v. Balme and Others*, instead of *Balme and Others v. Hutton and Others*, as it should have been, the judgment below having been for the defendant *Jewison*. See Vol. II. 46.

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on the one hand, or the authority of some doubtful if not obsolete decisions on the other.

BOLLAND B.—The facts found by the special verdict, upon which the questions arise that the court is met to decide upon, having been so fully called to our attention, it becomes unnecessary for me to restate them.

The learned judges, who formed the court of Common Pleas when this special verdict was before it, being satisfied that there had been a sufficient conversion to raise the question of the defendant's liability, and that court having recently decided in the case of *Price v. Helyar* (a), that a sheriff, who had taken in execution the goods of a bankrupt, as the defendant in the present case has done, was liable in trover to his assignee, although such sheriff had no notice of the bankruptcy, and a commission had not been sued out at the time of the execution, delivered judgment in favour of the plaintiff, leaving the defendant to resort to a court of appeal, if he should be desirous to have the question of law again discussed.

The chief point now submitted to us having been so lately decided in the court of which I am a member, in the case of *Balme v. Hutton*, after a most anxious consideration of all the cases that are to be found in the books respecting it, and agreeing, as I did, and still do, with all that was said by the learned lord chief baron in the elaborate judgment delivered by him as the unanimous opinion of the court, I might, as far as relates to the main question, content myself with referring generally to that decision, and shortly pointing out some of the authorities that led me to the conclusion I arrived at; but as that judgment of the court of Exchequer has been since reversed, and I cannot but be aware that a great difference of opinion exists in the minds of the judges, I shall state more fully than I

(a) 4 Bing. 597.

should otherwise have done, my reasons for still adhering to the opinion I have before delivered on the question.

There are two points arising upon this special verdict. The first is, whether the defendant below is liable; the second, if he is liable, to what extent.

The claim of the plaintiff below is founded upon a statutory provision by which the property of a bankrupt, at the time of his bankruptcy, is subjected to the operation of a commission against him.

The late stat. 6 *Geo. 4.* c. 16., by which the law of bankruptcy is now regulated, though it differs in some parts from former acts, furnishes no ground for a difference of construction in this particular. The cases, therefore, that have arisen upon former statutes are still to be considered as authorities upon the point before us.

The defendant in the action was a ministerial officer, he was acting in the execution of his duty as sheriff, in obedience to a command from one of the superior courts of justice; the proceeding was not for his benefit, it was in the king's name; the property at the time of the seizure was in the bankrupt, and the defendant had no notice of the bankruptcy. Looking at this state of things, it does appear to me a very strong measure to make this public officer a wrong-doer, in consequence of subsequent events, over which he had no control. But it is said this hardship upon the sheriff cannot operate in his favour; and instances are adduced in which the law holds him answerable for acts performed in the course of duty, and in which he has been equally innocent, and honest, as in the present case. I admit that many, and very serious liabilities are thrown upon sheriffs, but those liabilities were known to the courts that decided the earlier cases, and yet those cases establish a distinction between the re-

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sponsibility of a sheriff, and an execution creditor. I allude to *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*.

The case of *Bailey v. Bunning* (a) is the earliest, I believe, on this point. It was an action of trover against a bailiff; the jury found a special verdict. On the 6th of June, J. S. committed an act of bankruptcy; on the 11th of June, J. D. sued out a fi. fa. against the goods of J. S. tested 4th of June, under which the defendant seized; a commission against J. S. afterwards issued, and the goods were assigned by the commissioners to the plaintiff; if the taking by the defendant were lawful, the jury found for him, if not, for the plaintiff. It is unnecessary to state the grounds upon which it was argued at the bar. It came on first in Trinity 17 Car. 2. Judgment was not given till Easter term following, the case was decided in favour of the defendant, he being an officer obliged to execute the writ, who could not know of the act of bankruptcy, or that any commission would be sued out. The case is also reported in 1 Sid. 271, and is put by him on the official character of the defendant only. It is observed in the report of *Cooper v. Chitty* (a), by Lord Mansfield, that *Siderfin* does not seem to know what the court was going upon; for the court tied it up to the taking, whereas he does not seem to distinguish between the trover, and the trespass. It must be admitted the report is imperfect in some particulars, but as to the grounds of the judgment *Siderfin* agrees with *Levins*; and it is material to observe, that in the report of *Philips v. Thompson* in C. B. by *Levins*, in his third volume, 193, the judges, in noticing *Bailey v. Bunning*, stated that that case was decided solely in excuse of the bailiff, who ought to be excused for executing the writ, and not on the ground that the goods

(a) 1 Lev. 173.

(b) 1 Burr. 35.

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were bound by the writ; and it must not be lost sight of in estimating the weight to be given to the reports in the third volume, that they are reports of cases determined during the time that *Levinz* was a judge of the court of Common Pleas, and of others which were decided after he was removed from the bench. It appears, therefore, that *Bailey v. Bunning* may be relied on as an authority, that in the case of an officer an act would be lawful, which if done by an ordinary person would be an unlawful taking, and subject the doer to an action of trover. *Lechmere v. Thorogood* is the next authority; it is to be found in 3 *Mod.* 236, 1 *Show.* 12, *Comb.* 123: it was an action of trespass by the assignee of a bankrupt against the sheriff of *London* and others for seizing the goods of the bankrupt, after an act of bankruptcy by him. The act of bankruptcy was committed on the 28th *April*, the seizure was on the 29th; it was put by *Shower arguendo*, that though the statute vested the property of the goods in the assignee, yet this relation shall not work a wrong to make the officer a trespasser, who had a good authority and took the goods lawfully; and so is the case of *Bailey v. Bunning* (a). The court was clear that the verdict was against the plaintiff, entire damages being given, and that this action lay not against the officers though trover would against the party, and so judgment for the defendant.

Here again the distinction between officers and other persons is recognized by the court, and though the action was trespass, it is clear from the report that the decision would have been the same had it been trover.

In *Cole v. Davies and Others*, assignees of *Maul*, a bankrupt, Lord *Raymond*, at p. 724, reports *Holt C. J.* to have ruled at *nisi prius*, that if the goods of *A.* be seized upon a *fi. fa.* issued upon a judgment obtained against *A.*, and after the seizure *A.* becomes bank-

(a) *Sid.* 271, 272.

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rupt, this act of bankruptcy cannot affect the goods levied in execution as aforesaid; but if *A.* was a bankrupt before the seizure, and after the bankruptcy the sheriff, upon a writ of *fi. fa.* to him directed upon a judgment obtained against *A.*, seizes the goods and sells them, and a commission of bankruptcy is granted, and the said goods seized by the commissioners, the assignees may maintain trover against the vendee of the goods, but no action will lie against the sheriff, because he obeyed the writ. The authority of this report is impeached by Lord *Mansfield* upon the ground of Lord *Raymond* being young at the time, and that it is a loose note of what was said obiter. With the highest respect for every opinion delivered by so great a man as Lord *Mansfield*, I must take the liberty of saying that the four resolutions in Lord *Raymond's* report, of which that I have extracted is the first, appear, as far as the reporter is concerned, to bear the stamp of accuracy; the positions laid down are plain and simple, and such as even a young man of so much talent as Lord *Raymond* could readily comprehend. The case of *Aldridge v. Ireland* (a) strongly supports these cases.

The case of *Cooper v. Chitty and Another* was an action of trover by the assignees of a bankrupt against the sheriffs of *London*. On the 4th *November* the trader committed an act of bankruptcy, on the 5th a *fi. fa.* issued against his goods, on the 8th a commission was sued out and an assignment of his property was executed; on the 28th the sheriff sold the goods; thus the seizure was at a time when the sheriff was ignorant of the act of bankruptcy, but the sale was 20 days after the commission and assignment, and when the bankruptcy was notorious. No notice could be fuller, and it seems that the judgment proceeded upon the

(a) 1 Taunt. 173.

sale having been after notice of the bankruptcy; and that the sheriff had done an act which, even in his character of a public officer, amounted to a wrongful conversion, and rendered him liable to answer to the assignees in an action of trover; but that the seizure even after the act of bankruptcy was in the case of the defendant, as sheriff, excusable. The court of Exchequer, in its judgment in *Balme v. Hutton*; after having taken the same view of the case of *Cooper v. Chitty* as I have, at very great length, pointed out many expressions used by Lord *Mansfield*, to show that he never could have intended that case to have the extended operation contended for on the part of the plaintiff. As the judgment is fully reported I should very unnecessarily consume the time of the court were I again to state them. I may, however, be permitted shortly to observe, that unless many observations of that learned lord were meant to point out and to draw a distinction between the liability of an officer who acted in ignorance, and one who proceeded to a sale after notice of a bankruptcy, he took very unnecessary trouble, and delivered an opinion at very great length which might have been comprised in a few sentences.

In 1807, the case of *Potter v. Starkie* was tried before Mr. Baron *Wood* at *Lancaster*. It appeared on the trial, that on the 1st of the month a *fi. fa.* was delivered to the sheriff, and on the 2d *J. S.* committed an act of bankruptcy; the sheriff seized on the 3d. The judge held the sheriff liable. A rule nisi for a new trial was obtained, *Cooper v. Chitty* and *Timbrell v. Mills* were quoted and relied on by *Richardson*, then counsel for the sheriff; and it was contended that the ground of decision in those cases was, that the sale was after the assignment, when the sheriff must be taken to have had notice of the bankruptcy. It was urged in favour of the plaintiff that the sheriff had not

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taken the goods mentioned in the writ, *i. e.* the goods of *J. S.*, but those of other persons, and that he was therefore guilty of a conversion. The rule was discharged, and *Best C. J.*, in his judgment in *Price v. Helyar*, says, "we were anxious, however, to inquire about the case of *Potter v. Starkie*, and we learn from *Richardson J.* that the report of that case, in the argument in *Maule and Selwyn*, is accurate; that the court of Exchequer did decide in the manner there stated, and gave the reason there assigned, that the case depended upon the previous decision in *Cooper v. Chitty*; and we think the case of *Cooper v. Chitty* embraces the principle upon which we now decide."

The case of *Potter v. Starkie* was therefore determined upon the single authority of *Cooper v. Chitty*. *Bailey v. Bunning*, *Lechmere v. Thorogood*, *Cole v. Davies* were not referred to, either at the bar or by the court; no distinction was drawn between the officer, the minister of the law, and the execution creditor, by whom and for whose benefit the law is put in motion. *Wyatt v. Blades (a)*, was a case tried before Lord *Ellenborough*; it was trover for taking the bankrupt's goods in execution after a secret act of bankruptcy. The act of bankruptcy was on the 8th *December*. The sheriff seized under a *fi. fa.* on the 8th *February*, and removed the goods; a commission issued on the 12th, and notice not to sell was served on the sheriff. The sheriff did not sell, no point was raised but upon the conversion, and Lord *Ellenborough* held the removal of the goods sufficient to make the officer liable. It must however be observed that the cases that had made a distinction between the liability of the sheriff, and that of other persons, were not at all brought under the consideration of his lordship. The cases of *Lazarus v. Waithman (b)*, in which the sale

(a) 3 Camp. 396.

(b) 5 B. Moore, 313.

was before the assignment; *Price v. Helyar* (a), where the sheriff had not only levied but paid the money to the execution creditors more than six weeks before any commission issued; and *Dillon v. Langley* (b), are certainly authorities to support the decisions in *Potter v. Starkie*; but as in them, as in *Potter v. Starkie*, the earlier cases of *Bailey v. Banning*, *Lechmere v. Thorogood*, *Cole v. Davies*, and *Aldridge v. Ireland*, were never mentioned, since no distinction was presented to the court on either of them between the sheriff and the execution creditor, but the determinations in all of them appear to me to have proceeded on the erroneous view that was taken of the case of *Cooper v. Chitty*, I cannot allow them to have that weight, which a deliberate consideration of the cases that preceded *Cooper v. Chitty* would have given them.

If therefore no facts had been found by this special verdict, to take it out of the rule that guided the courts in their decisions of the three cases that preceded *Cooper v. Chitty*, in respect of the liability of the sheriff, as being the mere minister of the law; and as I am irresistibly led, by many of the observations in the judgment of Lord Mansfield in *Cooper v. Chitty*, to believe that the same rule was recognized by him in deciding that case, and that he never meant to extend the liability of a sheriff to the alarming length, to which later cases have carried it, I should feel myself called upon to give my judgment for the defendant below. That judgment I am, however, upon this special verdict prevented from pronouncing. It appears that part of the goods seized to the value of 5*l.* was packed up by the order of *John Williams*, an agent of the defendant in the action, and sent to *Bridport* to *William Restarick*, to be deposited and kept by him till 5*l.* were paid, a part of the sheriff's poundage, and the expenses of

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(a) 4 Bingham 597.

(b) 2 Barn. & Adol. 131.

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Restarick for the inventory, holding possession, levying, and other expenses, and that such goods were held by *Restarick* for about two months, when, upon payment of the 5*l.* they were forwarded to *London* to *Joshua Payne* the execution creditor. This, I am of opinion, is a sufficient conversion by the sheriff, the defendant in the action, to entitle the plaintiff below to have a verdict entered for him for 5*l.*, the value of such goods.

PARKE J.—The principal question in this case is, whether an action of trover will lie at the suit of the assignees of a bankrupt against the sheriff, for the conversion of goods seized under a *fi. fa.*, such conversion having taken place in the due course of levying under that writ, after the act of bankruptcy, but before notice of it, and before the issuing of the commission. Another question has been raised, as to some goods of the value of 5*l.*, which may be considered as not having been seized under the writ, and as having been converted after the issuing of the commission; but as I am of opinion that a conversion by seizing and disposing of the goods seized, in due course, under an execution after an act of bankruptcy, and before the commission, or notice of an act of bankruptcy, renders the sheriff liable in this form of action, it is unnecessary to draw any distinction between the two portions of goods which are the subject of this special verdict; and I am clearly of opinion that the plaintiff in error is liable for both.

The present case is precisely similar, as to the principal question, to that of *Balme v. Hutton*, recently so much discussed and considered in the Court of Exchequer, and of Exchequer Chamber, in which all the previous authorities were reviewed, and the decision of the former court was reversed by the all but unanimous opinion of the latter, and by the Court of Error; this

action was held to be maintainable. I must own that it appears to me, that even if a different opinion might have been entertained before that case, we must conform to that decision, if we are to treat the present case in the same way that others have hitherto been treated. In our system of judicature we are bound by precedents, and the authority of previous cases, unless they are plainly and manifestly founded upon erroneous principles; and that for the wise purpose of securing a reasonable degree of certainty in our judicial proceedings. We have here a direct authority, in addition to a great number which existed before upon this very question, a solemn judgment of a Court of Error, which has reversed that of the court below; and whatever respect we may feel for judges of that court, it has thereby, for the present at least, deprived that judgment of its authority, as a guide in similar cases. We are not in the situation of being obliged to weigh the conflicting decisions of two different yet equal courts against each other, and of contrasting the arguments in favour of each; but we are bound to consider the judgment of one court as annulled by the superior authority of the Court of Error, and to treat it as being wrong in point of law, until the highest tribunal in the country shall have pronounced a different opinion, or unless the judgment of reversal should appear, beyond all reasonable doubt, to have proceeded on wrong principles, which it is quite impossible to predicate in the present instance. If we do not adopt this course, no decision, except that of the House of Lords, can be safely relied upon as an authority by practitioners, in advising their clients, or by judges in pronouncing an opinion upon questions of law. Upon this ground, though I had entertained ever so strong an opinion in favour of the decision of the Court of Exchequer, I should have felt bound to defer to the

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judgment of a superior court, and to act in conformity to it in other cases: but if called upon to advise the House of Lords on a writ of error, I should have undoubtedly considered myself at liberty to express this opinion which I entertained, without giving the same weight to the particular judgment under review. But supposing that no such decisions had taken place as those in the case of *Balme v. Hutton*, or that each is to be deemed of equal weight, so that we are to decide this case without being bound by either, it seems to me to be quite clear that, independently of that case, the weight of authority is so strongly in favour of one side, that unless we are prepared to relinquish the principle on which judges have always hitherto acted, we are bound and concluded by it; for I am quite satisfied that it cannot be fairly said that the cases are founded upon principles which are clearly and manifestly wrong. I am quite at a loss to know when a question is to be deemed to have been decided and finally settled, if this is not. The cases of *Potter v. Starke* (a), *Lazarus v. Waithman* (b), *Price v. Helgar* (c), *Dillon v. Langley* (d), are all decisions in banc upon this point. The opinion of Lord Chief Justice De Grey, in *Hitchin v. Campbell* (e), is to the same effect, though that was not the question in judgment. On the case of *Wyatt v. Blades* (f) I place no reliance, as it was only *ex parte*; but it shows that it was taken for granted by Lord Ellenborough and the bar. The same point has been so laid down in different text books (as *Cooke's Bankrupt Law*, *Bac. Abr. Gwill.* ed. 1798;) and I may say for myself, that since I became a member of the profession, and in the habit of advising others, I have considered that no question of bankrupt law was more

(a) 4 M. & S. 260.

(b) 5 Bingh. 313

(c) 4 Bingh. 597.

(d) 2 Barn. & Adol. 131.

(e) 2 Wm. Blackstone, 839.

(f) 3 Campb. 89d.

completely settled than this; I never heard that any doubt was entertained upon it, and I certainly felt some surprise when the objection was taken, on the first motion for a new trial, in the case of *Balme v. Hutton*.

To countervail so many modern authorities and the established modern practice, what arguments and what authorities are adduced on the other side? It is said, first, that these cases have proceeded upon a notion that the question was decided in *Cooper v. Chitty*, whereas the only point there decided was, that the sheriff was liable in trover, where he seized after a secret act of bankruptcy, and sold after the assignment. In answer to this, I say, that the judges in all these modern cases have not been under a misapprehension as to the effect of the case of *Cooper v. Chitty*; it was not treated as a case in point, but as showing generally that the property in goods was vested by relation to the act of bankruptcy in the assignees, where the execution was not executed before it; and that mere property is a sufficient title in an action of trover, though not in an action of trespass, in which, by the rule of common law, possession is necessary at the time of the trespass committed.

This principle I consider as having been laid down by Lord *Mansfield* in that case when he speaks of making persons trespassers to the assignees; that word is marked in italics in Lord *Kenyon's* report, (p. 418,) and it is explained by the context to mean not wrongdoers generally, but trespassers in the technical sense, and subject to an indictment or action of trespass: and it is perfectly clear that the Court of King's Bench, in the case of *Smith v. Miles* (a), considered Lord *Mansfield* as having laid down and acted upon this distinction between the two forms of action; and Lord Chief Justice *De Grey*, in *Hitchin v. Campbell* (b), expressly

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(b) 2 W. Bl. 779.

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states that this distinction prevails. He says "that notwithstanding the transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued; but by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee."

It is next urged that the authority of these numerous modern cases is at variance with two ancient decisions, that of *Cole v. Davies* (a), and *Bailey v. Bunning* (b), which, it is said, have not been adverted to in the modern cases.

The first of these is a short note of Lord *Raymond* of a nisi prius decision of Lord *Holt*: the facts are not stated, and Lord *Mansfield*, in *Cooper v. Chitty*, treats it as of no weight.

From the different reports of the latter case it is difficult to discover the precise ground of the decision: but it seems, I think, to have been decided for the defendant upon the peculiar form of the conclusion of the special verdict, which, after stating the time of the teste of the writ, act of bankruptcy, taking and commission, and assignment, refers to the court this question only, whether the goods were well taken or not; and it is to be observed, that no other conversion than the original taking was found in that case, for the goods remained in the hands of the defendant at the time of the commencement of the suit, (see the substance of the special verdict, 2 *Tyruwhitt's Reports*, 622,) and the demand and refusal, it is well known, do not constitute a conversion, but are only evidence of it. The court may have proceeded on the ground that the *taking* was not at the time unlawful, being made by an officer who had then a right to take, and was not a mere unauthorized

(a) Lord *Raymond*, 729.

(b) 1 *Lev.* 173; 1 *Siderfin*, 271; 1 *Keble*, 930, 932, and 2d *Keble*, 32.

seizure; that it was not even by relation a trespass, and that a taking which was not a trespass could not of itself without more be a conversion: at any rate this case is not to be put in competition, in point of authority, with the numerous subsequent cases and the long-established practice on this subject.

Of the case of *Lechmere v. Thōrogood* (a), which has also been noticed as an authority at variance with the modern cases, it is enough to say that it was an action of trespass; and the case of *Bailey v. Bunning* there cited, is only cited to prove that the taking is not a trespass.

So stands the question upon authority, and the balance is undoubtedly in favour of the modern decisions and the long-established practice; and if we are to follow the ordinary principles of decision, assuredly we are bound by them; but if we are to disregard them upon this occasion, then we must disregard both alike; we must not treat the case of *Bailey v. Bunning* as binding upon our judgment, and all the others as of no avail.

Let us see then how the case stands independently of all authority. It lies in the narrowest compass, and is a question of construction only of the positive enactments of the statute law, by which the commissioners were empowered to transfer the bankrupt's property originally to particular creditors, afterwards to general assignees. Is the effect of that assignment to transfer the property at the date of the act of bankruptcy, as to the sheriff and other ministerial officers of the same character, or is it not? This is the whole question. If it is, the sheriff must be liable—if not, he is excused.

The common law doctrines on the subject of relations, § *Coke*, 26, 29, "that no relation shall make that tortious which was lawful;" and "that relations are

(a) Comb. 123; 1 Show. 12; 3 Modern, 236.

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fictions at law which shall never do wrong," have, in my judgment, no legitimate bearing upon the point to be decided; and if they had, the argument arising from them would go the length of protecting creditors also, and all others who acquired a property in the goods of the bankrupt, by an act lawful at the time. But the relation is not a fiction of law created by the common law for the purpose of doing justice, but it is created by the express provisions of an act of parliament, and the only question is, whether it is a qualified relation or not.

If the sheriff is not affected by the statutes, it must be because their provisions creating the relation do not comprise that officer; or because, if they do, he is by some other clause expressly, or by the purview of the statutes impliedly, exempted from their operation.

First, let us examine the clauses of the bankrupt statutes, and see whether they extend to such an officer or not.

The first statute, 34 & 35 *Henry* 8. c. 4., gives a power of sale of the bankrupt's lands, tenements, goods, &c., which is to be good and effectual in the law to all intents, constructions, and purposes, as though it had been made by the bankrupt, by writing, indented, inrolled, &c.; but this statute appears to me to give no retrospective operation to the assignment.

The important statute is the 13 *Eliz.* c. 7., which, after enumerating what are to constitute acts of bankruptcy, empowers the Lord Chancellor to grant a commission, and the commissioners to take by their discretion such order and directions, as well with the body of the offender, as also with all his lands, tenements, and hereditaments which he shall have in his own right before he become bankrupt, and also with all such lands as such person shall have purchased jointly with his wife, children, or child, to the only use of such offender, or of or for such use, right, or titles, as

such offender then shall have in the same, which he may lawfully depart withal or with any person of trust to any secret use of such offender; and also with his money, goods, chattels, wares, merchandizes, and debts; and by deed indented, inrolled in one of the queen's courts of record, to make sale of the lands belonging to the bankrupt, freehold and copyhold, and also of all fees &c., goods and chattels, or otherwise to order the same for the true satisfaction and payment of the creditors, rate and rate like, according to the quantity of their debts; and the section then proceeds to enact, that every direction, order, bargain, sale, &c., shall be good and effectual in the law for all intents, constructions, and purposes, against the said offender, or debtor, his wife, heir or heirs, child or children, and such persons as by such joint purchase with the offender shall have any estate or interest in the premises, and against all other person or persons claiming by, from, or under such offender or debtor by any act or acts had, made, or done after any such person shall become bankrupt, as is aforesaid, and also against lords of manors whereof such copyhold lands were holden, their heirs, successors, and assigns.

The 21 *Jac.* 1. c. 19. s. 9., "for the better distribution of the lands, goods, chattels, &c. of the bankrupt to and amongst his creditors," enacts (*inter alia*), "that all and every creditor having security for his debts by judgment, statute, recognizance, specialty, or having made attachments in London, &c., of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands &c. and goods of such bankrupt, before such time as he shall or do become such bankrupt, shall not be relieved upon any such judgment &c., for any more than a rateable part of their just and due debts with the other creditors of the bankrupt, without respect to any

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penalty or greater sum contained in any such judgment, &c."

The 4 *Ann*, c. 4. s. 8., first mentions the assignees of the commissioners, and 6 *Ann*, c. 22. s. 4., first directs a meeting to be held by the creditors for the choice of assignees. Until the time of passing of one of these statutes, the effects of the bankrupt were assigned to different creditors, and not to general assignees for the benefit of all.

It is unnecessary to notice the subsequent acts of parliament, further than to say that the 5 *Geo.* 2. re-enacts, alters, and adds to the provisions of former statutes, some of which had expired, and that this and the following statutes were repealed by the bankrupt law at present in force, 6 *Geo.* 4. c. 16. This last act of parliament, by s. 63, directs the commissioners to assign the bankrupt's estate and effects to the assignees, but it has no words avoiding mesne acts, or giving a relation to the act of bankruptcy. The clause has been taken from the 21 *Jac.* 1. c. 15. s. 13., and 5 *Geo.* 2. c. 30. s. 26., without considering that those statutes were to be construed in conjunction with 13 *Eliz.*, which gives the retrospective effect to the assignment: but by the new act that statute is repealed. Notwithstanding this oversight, however, I apprehend that the assignment under the new statute must be held to have a similar operation to that under the old: and indeed it never has been contended otherwise, either during the present argument, or on any other occasion. The question therefore seems to me to turn upon the construction of the 13 *Eliz.* and 21 *Jac.* 1., which former statute is by the express provision of the latter to be "in all things largely and beneficially construed and expounded, for the aid, help, and relief of the creditors." It is contended on the part of the sheriff that he is not affected by the retrospective clause, because

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he does not claim "by, from, or under such offender, by any act had, made, or done after he became bankrupt." But it appears to me that the sheriff who has a right to take only such interest as the bankrupt has, by virtue of the judgment and execution against him, does claim "by or under him;" not indeed by a voluntary act or conveyance of the bankrupt, but still by an act done after the bankruptcy; for the teste or the issuing of the writ which, as the law then stood, would, if this statute had not passed, have given to the sheriff a right to seize goods, as against subsequent purchasers, was undoubtedly "an act done." The clause, it is to be observed, says nothing as to the act being voluntary, or being the act of the bankrupt himself. Let us suppose that a lease was made by the owner of a chattel, and a covenant for quiet enjoyment in that lease, against all claiming by, from, or under the lessor, by any act or acts, had, made, or done, and that the sheriff seized and sold the chattels under an execution against the lessor, tested and delivered to the sheriff before the lease, would not this be a breach of the covenant? And besides, if the sheriff does not claim by or under the debtor, the execution creditor certainly does not, and the assignment would not be good against him, which is a point that has never for a moment been contended. Further, if the sheriff be not a person claiming under the bankrupt, it must be wholly immaterial whether he have notice of the act of bankruptcy, or even of the commission, or not: he cannot possibly be a person so claiming, because he has notice of either or both those facts, if he is not without; and therefore if the construction contended for by the plaintiff in error is put on the words of the statute, it follows that the sheriff would not be liable if he seize the goods of the bankrupts with full knowledge both of the bankruptcy and commission; a proposition which is not

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attempted to be asserted, for on the contrary it is distinctly admitted that he must be liable in such a case. It seems to me therefore that the sheriff, if he had seized and sold under a writ tested and issued after an act of bankruptcy, would not have been protected upon the proper construction of the statute. The 21 *Jac.* 1. c. 19. prevents a creditor from having any lien on the land of the bankrupt by a judgment obtained, or on his goods by a *fieri facias* tested or issued before the bankruptcy; it prohibits the commissioners from issuing to such person more than a rateable part, in the same way as to the other creditors; that is, the lands notwithstanding such judgment, and the goods notwithstanding such writs of *fieri facias*, were to be assigned proportionably to each creditor, like the bankrupt's other goods; and consequently since that statute the sheriff could not have seized, after an act of bankruptcy, any goods of the bankrupt under a writ tested or issued before the act of bankruptcy. Since the statute of 6 *Ann.*, if not since the 4th, the commissioners have had the same power of assigning to the general assignees that they had before, of assigning to individual creditors: and the sheriff has no power to seize any of the effects so assigned, after the act of bankruptcy, under a writ, whenever tested, issued, or delivered to him. The provisions therefore of the statute of *Eliz.*, in my judgment, affect the sheriff as well as all other persons claiming title to the bankrupt's goods, either by contract with or assignment from the bankrupt, or by operation of law; and the same relation which is given by the first statute is no doubt continued by all those which follow, and by the existing law.

This brings me to the second question, whether the case of the sheriff is in any way excepted from the operations of the statutes which give this relation. It is

certainly no where expressly excepted; and if the exception exist, it must be implied.

Now, I take it to be clearly the duty of courts to construe acts of parliament only, and that duty is to be performed by construing them according to the legal, ordinary and grammatical sense of the words used, unless such construction would be inconsistent with the purpose of the legislature express or implied, or lead to some manifestly unreasonable or absurd consequence; in which cases the language may be qualified so as to obviate the inconsistency or mischief, but no further. The question is always, what is the meaning of that which the framer of the act has done, not what he ought to have done. It cannot be said that the construction which makes the sheriff liable is inconsistent with the avowed purpose of the legislature, the even distribution of all the bankrupt's effects; on the contrary, it is clearly in furtherance of it, by extending the remedy for the recovery of the bankrupt's goods. The only ground upon which an application can be rested in this case is, that such a construction would be unreasonable on account of the hardship on the sheriff; but a mere hardship on particular individuals is not unreasonable, when it is for the purpose of completely securing an object beneficial to a great class; and if the mere hardship on some could be a • legitimate ground of introducing implied exceptions, why should we stop with the sheriff? The case of persons deriving title from the bankrupt, by purchase and payment of the purchase money, by taking a pledge of the bankrupt's goods, by paying their debts to the bankrupt, by receiving their debts from him in ignorance of the bankruptcy, are all cases of hardship, not perhaps quite so great as that of the sheriff, but certainly so nearly approaching to it in degree, that it is impossible to draw a line between them and say that

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the court shall imply so far on account of the hardship, but no further. The only distinction in the case of the sheriff is, that he is not a volunteer, he is bound to execute the process of the court, and liable to an action at the suit of the creditor for not executing it, even though he knows of the act of bankruptcy, in which the damage may equal the amount of the debt. With respect to the extreme difficulty of acquiring knowledge of the act of bankruptcy, and the physical impossibility of knowing whether a commission will afterwards be issued or not, he is precisely in the same situation with all other persons who intermeddle with the bankrupt's property. It is, however, admitted in the argument on the other side that it is not this peculiarity in the sheriff's case that is the ground of exception—for it is allowed that if he knows of the act of bankruptcy he is not to be exempted—and yet he is just as much under an obligation to execute the process, and liable to an action if he does not, with as without that knowledge, unless not only a commission has issued, but unless it has been acted upon and an assignment has been made; and therefore it follows, either that this distinction between his liability, with notice of the bankruptcy and without, must be abandoned and the sheriff exempted in both cases, or that there is just as much reason to exempt all other innocent persons as the sheriff; for all may by diligent inquiry equally well ascertain whether there has been an act of bankruptcy or not. In truth, this doctrine of exceptions by implication from the statute, on the ground of hardship, is an usurpation upon the province of the legislature. Their object, by giving a retrospective operation to the assignment, was to secure the equal distribution of the bankrupt's effects, and for that purpose it was deemed more beneficial to provide that the assignment should by relation defeat all mesne acts

at the expense of hardship in individual cases, than by giving it only a present operation to allow an opportunity to those fraudulent and improvident dispositions, to which men in a state of bankruptcy almost invariably have recourse. Where the operation of this general rule has, in the experience of the legislature, produced peculiar hardship, they, and not the courts of law, have in various subsequent statutes mitigated its severity; and if by continued experience the case of the sheriff shall appear deserving of it, we must trust to the wisdom of the legislature to make an exception, and not, by making one ourselves, violate the principle upon which judicial decisions ought to be made. Upon the ground of authority, therefore, and independently of authority, upon the fair construction of the statute law, I think the sheriff is liable to this action, and that the judgment of the court below ought to be affirmed.

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VAUGHAN B.—After the elaborate discussion of this question in the case of *Balme v. Hutton*, first in the Court of Exchequer, and afterwards upon a writ of error in the Exchequer Chamber, I enter with unfeigned reluctance upon an examination of the arguments used and the authorities referred to upon those occasions. But concurring as I did in the judgment delivered by Lord *Lyndhurst* in the Court of Exchequer, from which the majority of the judges in the Court of Error have since differed, I feel it my duty to state the reasons which upon repeated reflection have served only to confirm my original impression.

The main question raised by this special verdict, and involving an important principle of law, is, whether a sheriff having seized the effects of a trader and sold them under a fieri facias issued after a secret act of bankruptcy, of which he had no knowledge, is liable for the value of the property so sold in an action of

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trover at the suit of the assignees appointed under a commission subsequently issued? I admit the general proposition, that after an assignment by the commissioners all the property of the bankrupt must be considered, from the moment of the act of bankruptcy, as being *by relation* the property of the assignees, and that persons possessing themselves of such property and dealing with or disposing of it to others, are liable to be sued for the amount in an action of trover. But when I admit such to be the *general* rule prevailing in the administration of the bankrupt laws, I conceive an exception to be established or necessarily implied in favour of the sheriff—a public officer compelled to execute the king's writ, and to sell under the process of the law.

The liability of the sheriff must be founded either,

First, Upon the nature of his office and upon the obligations and duties incident to it; or

Secondly, Upon some legislative enactments; or

Thirdly, Upon the authority of decided cases.

And, First as to the obligation and duty of the sheriff.

The sheriff acts as a ministerial officer in execution of the command he receives in the king's name from a court of justice, and which command he is *bound* to obey. He is not a volunteer acting from his own free will, or for his own benefit, but imperatively commanded to execute the king's writ. He is the servant of the law, and the agent of an overruling necessity; and if the service of the law be a reasonable service, he is justly entitled to expect indemnity, so long as he acts with diligence, caution, and pure good faith. *Necessitas quidquid cogit, defendit*; and it should be remembered he is not at liberty to accept or reject the office at his pleasure, but *must* serve if commanded by the crown. All these considerations entitle him to protection, and in my humble judgment ought to exempt him from the

character and consequences of a wrong-doer, where neither guilt nor laches can be imputed to him.

Whether he has any such exemption, is the point to be ascertained. As to any legislative enactments, the statutes more immediately relating to this subject are 34 & 35 *Hen. 8. c. 4.*, 13 *Eliz. c. 7.*, 21 *Jac. 1. c. 19.*, 5 *Geo. 2. c. 30.*, and 6 *Geo. 4. c. 16.* These several acts relating to bankrupts are *general*, and do not in *express* words create any liability in the sheriff, or establish any exception in his favour.

It does not appear to me that any inference unfavourable to the sheriff can be drawn from the first statute upon the subject, viz., 34 & 35 *Hen. 8.*, which directs that every thing done by the Lord Chancellor, and other great officers of state to whom authority was given to dispose of the property of persons therein described, should be "good and effectual to all intents and purposes against the offenders, as though the same had been made by the said offender or offenders *at his or their own free will or liberty*," thereby giving to the commissioners the same authority to deal with and dispose of the property of the bankrupt, as the bankrupt himself possessed prior to his bankruptcy. I am not aware that in any of the statutes relating to bankrupts, (certainly not in the earlier ones,) the name of the sheriff is expressly mentioned, neither do I conceive that the second section of the statute 13 *Eliz. c. 7.*, upon which much stress was laid, can be construed to extend to him. That section, in describing the persons against whom the acts or orders of the commissioners are declared to be good and effectual in the law to all intents, constructions, and purposes, uses these expressions "against the *offender or offenders*," (for the bankrupt was then regarded as a criminal) debtor or debtors, and against all other person or persons claiming *by, from, or under* such offender or

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offenders, debtor or debtors, *by any act or acts had*, made, or done *after* any such person shall become bankrupt."

It is not that the act or assignment of the commissioners shall be effectual against all persons claiming *by, from, or under* the bankrupt; but this qualification is introduced, "claiming *by, from, or under* him, *by virtue of any act* had, made, or done after he shall become bankrupt. And although the legislature has not superadded to the phrase "by virtue of any act had, made, or done," the words "*by him*," yet I think such to be their reasonable construction.

Can then the sheriff seizing the property of a bankrupt under a *fi. fa.* issued after a secret act of bankruptcy, (of which it is admitted he could have no knowledge,) be said to claim *by, from, or under* the bankrupt by force of any act done *after* his bankruptcy? The execution cannot be considered as emanating from the acts of the bankrupt. It is the fruit of a judgment obtained against him in mortuum, not moving from him "*of his own free will and pleasure*," to use the expression contained in the first section of the statute 34 & 35 Henry 8: but *involuntary* as regards the bankrupt, and *by compulsion*. I conceive that the legislature intended to disable the *bankrupt* from doing any act to control or dispose of his property after an act of bankruptcy committed by him, and from that moment to regard him as civiliter mortuum, and the assignees, when appointed under a commission thereafter to be issued, as *executors* invested by the legislature with the complete control over his property. The sheriff therefore not being *expressly* named, the words referred to do not, I conceive, in their natural interpretation extend to him, and I have heard no argument founded in reason, justice, or the policy of the bankrupt laws, to call for a construction which must

involve an innocent public officer in consequences which should attach only upon criminal neglect.

Upon the argument of this case, the attention of counsel was directed to the 9th section of the 21 *Jac.* 1. c. 19., which, after giving power to the commissioners to examine parties for the discovery of the debts due and owing to the creditors seeking relief under the commission, enacts, "that every creditor having security for his debt by *judgment*, recognizance, statute, or other security, or having no security, *whereof no execution or extent was served or executed* upon the bankrupt's estate *before* he became bankrupt, shall not be relieved upon any such judgment or other security for any more than a rateable part of their just debts with the other creditors of the said bankrupt. It should seem to have been the object of the legislature, in framing this provision, to deprive judgment or specialty creditors of any priority or preference derived from the teste of the writ, or otherwise, unless the execution was not only served *but actually executed* before the bankruptcy; and if such judgment creditor had fallen within the operation of the 13 *Elix.* c. 7. s. 2. as claiming *by, from, or under* the bankrupt, this 9th section of 21 *Jac.* 1. c. 19., depriving every creditor by judgment of the right to receive more than a rateable part of his just debt in common with other creditors, would have been unnecessary.

The same statute 21 *Jac.* 1. c. 19., declares that all the statutes made against bankrupts shall be largely and beneficially expounded in favour of creditors; and I presume it is in obedience to this enactment, coupled with the statute 13 *Elix.* c. 7. that the doctrine of *relation* was established, for the purpose of avoiding all intermediate acts done by the bankrupt between the time of the act of bankruptcy and the assignment of the commissioners, for the suppression of fraud, and

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with a view to insure an equal distribution of the bankrupt's property amongst all his creditors.

The 6 *Geo.* 4. c. 16., which repeals all the former acts, and consolidates their most valuable provisions into one statute, by the 63d section directs the commissioners to assign, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, and all his property and his debts, and vests the property, right, and interest in such debts as fully as if the assurance, whereby they are secured, had been made to *them*; and after such assignment enacts "that neither the bankrupt, nor any person claiming *through or under him*, shall have power to recover or release the same, but such assignees shall have the like remedy to recover the same as the bankrupt himself might have had if he had not been adjudged bankrupt."

This section seems to have been penned in conformity with the spirit and meaning of the statute 13 *Eliz.*, and requires not a more enlarged construction.

Assuming, therefore, that there are no legislative enactments which create a liability in the sheriff, either express or necessarily implied, in a case circumstanced like the present, I proceed to examine the leading judicial determinations applicable to the subject; and after reviewing all the authorities in succession from *Bailey v. Bunning*, to *Balme v. Hutton*, and comparing them with care and attention, I consider them, (more especially the earlier ones,) as recognizing an exception in favour of the sheriff, founded upon his character of a public officer and minister of justice, who, being the servant of the law, stands distinguished from third persons, who are under no legal obligations to intermeddle with the property of the bankrupt, and therefore act at their peril.

It cannot be disguised that it is difficult, (indeed

impossible,) to reconcile the latter cases of *Potter v. Starkie* (a), *Lazarus v. Waithman* (b), *Price v. Helyar* (c), *Wyatt v. Blades* (d), *Dillon v. Langley* (e), which decisions are in my judgment erroneously supposed to have emanated from the authority of *Cooper v. Chitty* (f), with the earlier decisions of *Turner v. Felgate* (g), *Bailey v. Bunning* (h), *Lechmere v. Thorogood* (i), *Phillips v. Thompson* (k), *Cole v. Davies and others*, *Assignees* (l).

Great reliance being laid on the case of *Bailey v. Bunning* by the counsel for the plaintiff in *Balme v. Hutton*, the record was searched, examined, and criticised in the court of error. It was there treated as a case badly and imperfectly reported, and as not stating the ground on which the judgment of the court proceeded; that the jury found a demand and refusal, but no conversion; and that the question for the court turned upon the taking. This case, which occurred in 17 *Car. 2*, is reported in 1 *Levinz.* 173, 2 *Siderfin*, 271, 2 *Keble*, 32. In these several reports there is a perfect accordance both in the statement of the facts, and on the precise ground on which the judgment of the courts was pronounced. It was objected that the special verdict was imperfect, inasmuch as it found (m) only that the goods had been seized, and still remained in the hands of the defendant, neither sold nor delivered to the execution creditor; that a commission issued, under which an assignment was made; and that after such assignment the plaintiff demanded the goods &c., of the defendant, who refused upon request to

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(a) 4 M. & S. 260.

(b) 5 B. M. 313.

(c) 4 Bingh. 597.

(d) 3 Campb. 396.

(e) 2 Barn. & Adol. 151.

(f) 1 Burr. 20; and Lord Kenyon's notes, 395.

(g) 1 Lev. 95.

(h) 17 *Car. 2*; 1 *Lev.* 173; 2 *Siderfin*, 271; 2 *Keble*, 32.

(i) 2 & 3 *Jac. 2*; 1 *Shower*, 12 and 146; 2 *Ventris*, 156; *Comb.* 123;

2 *Modern*, 236. *S. C.*

(k) 3 *Levinz.* 192.

(l) 10 *Will.* 3; 1 *Lord Raymond*, 724.

(m) See Vol. II. 622, n.

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deliver them ; but whether upon all the matters aforesaid they were well taken, the jurors were altogether ignorant, and therefore prayed the advice of the court, to whom, if it should appear they were not rightly taken, they said the defendant *Bunning* was guilty.

To this special verdict it has been imputed as a defect that no conversion was found by the jury, and that the court are not competent to find facts or draw conclusions for them ; whereas I apprehend that the frame of the record is perfectly correct, inasmuch as the jury, if they had found a wrongful conversion, would have concluded the point which they intended especially to reserve for the consideration and judgment of the court. It was insisted that the attention of the court had been addressed to the single consideration, whether the taking was lawful ; and that inasmuch as there was no sale or actual conversion of property, but a taking only and a detaining of it after a request to deliver it, the facts found were not sufficient to enable the court to decide that trover could be maintained. It is clear, however, to my understanding, that no objection was taken to the form of the special verdict, and if there had been ground for any such objection, I conceive a venire de novo would have been awarded. I think, therefore, we are bound to conclude that the case was adjudged upon the single point recorded by every reporter, viz. " that the sheriff being an officer was obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be sued out."

I have commented at some length upon this case, because it occurred within a few years after the statutes of *Elizabeth* and *James* came into operation, and it may be regarded as the foundation upon which the cases of *Lechmere v. Thorogood*, *Cole v. Davies*, and, I might add, the memorable case of *Cooper v. Chitty*, were af-

terwards decided. It appears from 2 *Keble*, 32, that upon the argument of *Bailey v. Bunning*, the case of *Turner v. Felgate*, adjudged in K. B. during the Commonwealth, about nine years before *Bailey v. Bunning*, was referred to by C. J. *Keeling*. It was an action of trespass against a man who, having recovered a judgment, had levied an execution. The judgment was afterwards vacated, and restitution awarded; whereupon the defendant in the original action brought trespass against the plaintiff, and it was there resolved, that the party who went with the sheriff to show him where the goods were, was a trespasser ab initio; but the court agreed that the sheriff was not suable or chargeable. *Keeling* C. J. agreed that trespass would lie against the party, but added, "the case is otherwise against an officer, as here, to whom relation shall work no wrong." Serjt. *Levinz*, in his report of the same case, desires the reader to note the difference between charging an officer and charging the party, for (he adds) in *Bailey* and *Bunning's* case hereafter, it is held, that the officer shall not be chargeable, where perhaps the party will be charged.

I am aware that the court, five years afterwards, in *Easter* term, 15 *Car. 2*, expressed their dissatisfaction with this judgment, and said that *tiel relationes ne ferra ascun home trespassor* (a). But the reason of the doubt and dissatisfaction thus expressed serves rather to confirm than weaken my position, that a distinction has always been recognized in favour of a public officer and minister of justice; for if such relation should make no man a trespasser, à fortiori it ought not to operate to the injury of the sheriff.

That in *Lechmere and Others v. Thorogood and Others*, *Hilary* term, 2 & 3 *Jac. 2*. the same principle

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(a) *Turner v. Felgate*, 2 Sid. 126.

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was established, and the same distinction recognized, is apparent from the report of that case in 1 *Shower*, 12. It was an action of trespass brought by the assignees of a bankrupt against the sheriffs of *London* and the execution creditor. Upon the second argument, Sir *B. Shower* says, "I now argued it again upon this point, that though by the statutes of bankrupts the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officers trespassers who have a good authority, and took the goods lawfully, and so is the case of *Bailey v. Bunning* (a); and the court was clear that the verdict was against the plaintiff, and that this action lay not against the officers, though trover would against the party."

No language can more clearly convey the decided opinion of the court, that neither trespass nor trover could be maintained against the officers, than the addition of the words "against the party." Upon judgment being given for the defendant, an action of trover was afterwards brought by the same plaintiffs in the Common Pleas against the same parties, when Sir *B. Shower* advised the plea to be drawn, which is incorporated into the special verdict, and prefixed to the report of the case in 2 *Ventris*, 156, stating the record in the former action of trespass, and averring that the cause of action and the parties were the same, and that the former judgment was a bar. The plaintiffs demurred, and upon the argument the whole court was clearly of opinion that the judgment in the former action was a bar, the actions being of the same nature. This case is reported in *Hilary*, 1 *Wm. & Mary*; 1 *Shower*, 12, 146; 2 *Ventris*, 156; 1 *Comb.* 123; 2 *Mod.* 236; 4 *Jac.* 2; *B. R.* 1680.

According to the report of this case by *Comberback*

(a) Sid. 271.

(who was recorder of *Chester* and a *Welsh* judge), the question was, whether the extent came too late, or whether the *fi. fa.* was well executed, so that the assignees could have no title to goods which were before taken in execution, and so in *custodiâ legis*. Neither the facts of the case nor the judgment of the court are very perspicuously reported, but being again spoken to in a subsequent part of the term, this passage will be found in that reporter, p. 123.

“ Afterwards in this term the court was of opinion that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time, and *Bailey v. Bunning's* case in *Siderfen* agrees; per *Holt* and *Dolbin*, *Trinity* term, 1 *W. & M. B. R.* In confirmation of the same doctrine, I would shortly refer to the case of *Phillips v. Thompson* (a), whereon a question arising whether the goods of a bankrupt were bound by the mere delivery of the writ to the sheriff, and before the writ was actually executed, the court said that the case of *Bailey v. Bunning* was resolved only in excuse of the bailiff, that he should be excused for executing the writ, and not that the goods were bound by the delivery of the writ.

In *Cole v. Davies and Others, Assignees*, (b) the same principle was recognized, and the same point ruled in the most distinct terms by Lord Chief Justice *Holt* at nisi prius in *Hilary* term, 10 *Will. 3.* at *Guildhall*. If *A.* be bankrupt before seizure, and after bankruptcy the sheriff under a *fi. fa.* upon a judgment against *A.* seizes the goods and sells them, and a commission of bankruptcy is granted, and the goods are assigned by the commissioners, the assignees may maintain trover against the vendee of the goods; but no action will lie against the sheriff because he obeyed the writ.

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(a) 3 *Levinz*, 192.(b) Lord *Raym.* 724.

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Lord *Mansfield*, in commenting upon the case of *Cole v. Davies*, as reported by Lord *Raymond*, takes occasion to observe, that the notes were taken by him when very young, and that they are too incorrect and inaccurate to be relied upon. At the same time his lordship (when speaking of the four general resolutions upon the evidence at nisi prius), remarks that the first resolution is an obiter reference to the determination in *Bailey v. Bunning*, and that it might not be at all material to attend to the distinction between trover and trespass. "Besides," he adds, "the case there put is of a sale by the sheriff before the commission, and the conversion might be as excusable as the taking, because he obeyed the writ; whereas here the goods were not sold till after both the commission and assignment. It is a loose note of what was said obiter. It manifestly refers to *Bailey v. Bunning*, but is no authority applicable to the present case."

I cannot but believe that this note of Lord *Raymond's*, of *Cole v. Davies*, would have been treated by Lord *Mansfield* with more respect, if his lordship had remembered that Lord *Holt* was chief justice when *Lechmere v. Thorogood* was decided; and according to the report of that case in *Comberbach*, cited *Bailey v. Bunning* from *Siderfin*, as an authority to prove that a construction should not be made to make the officer a trespasser by relation, because the taking was lawful. It is true that *Cole v. Davies* was a nisi prius decision only, but in my judgment it derives additional authority from being the echo of Lord *Holt's* judgment, delivered after much consideration about ten years before in *Lechmere v. Thorogood* (a).

In commenting upon these several cases of *Bailey v. Bunning* (b), *Lechmere v. Thorogood* (c), and *Cole*

(a) 3 Lev. 192.

(b) 1 Lev. 173; 1 Sid. 271.

(c) 1 Show. 12; 1 W. & M.; 1 Show. 146.

v. *Davies* (a), Lord *Mansfield*, according to Lord *Kenyon*'s report of *Cooper v. Chitty*, 421, observes, "these cases have determined that the taking of the goods was lawful, but how was the seizure lawful? Is it meant that it was lawful as against the assignees, or in any sense to change the property? Clearly not; for the assignees will pursue and avoid every disposition even in market overt. No more can be meant than this, that the sheriff not knowing anything of the secret act of bankruptcy, or that a commission would be taken out, shall not be punished as a wrong-doer for the taking which, though not lawful against the assignees, yet was innocent and excusable."

Having therefore shown that the earlier series of cases have distinctly recognized the act of the sheriff as excusable, although not lawful in the strictest sense of the term, I proceed to consider how far the case sub judice is affected by the judgment of the court in *Cooper v. Chitty* (b). It must ever be remembered that in that case the seizure by the sheriff was before, and the sale after a full knowledge of the commission and assignment. Lord *Mansfield*, through the whole of his elaborate judgment, directs the attention of his hearers to the strong and conclusive fact against the sheriff in that case, that the sale, which was the wrongful conversion insisted upon, was after the commission and assignment, both which acts are treated as matters of public notoriety. He never loses sight of this most important circumstance, as establishing a marked distinction between *Bailey v. Bunning* and *Cooper v. Chitty*. In adverting to the hardships to which it had been insisted the sheriff might be exposed, his lordship proceeds to say "that a case of hardship

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(a) 2 Ventris, 156; Ld. Raym. 724, and Comb. 123; 2 Mod. 236.

(b) 1 Burr. 20.

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can hardly exist upon the sheriff when the taking and sale or even the sale only are subsequent to the assignment. But in the present case the sheriffs knew of the bankruptcy before they sold the goods." He concluded his judgment in these memorable words; viz., "The seizure here is after the bankruptcy, and therefore after the property by relation is vested in the assignees. But that was innocent and excusable, and the sheriff shall not be liable by relation as a wrong-doer. The gist of this action is the wrongful conversion by the sale and false return long after the commission and assignment."

I therefore pray in aid the case of *Cooper v. Chitty*, as confirming the doctrine that the sheriff can neither be deemed a trespasser nor a wrong-doer by relation, so as to be liable in trover. I admit the doctrine of relation to the full extent in which it can be found necessary to carry it for the purpose of suppressing fraud, and insuring the equal distribution of the whole of the bankrupt's property amongst the general class of creditors. But there I would stop, treating it as alike unjust and impolitic to stigmatise as a wrong-doer a public officer and minister of justice acting at the time strictly in obedience to the law.

Much stress has been laid upon the expression reported to have been used by Lord *Mansfield*, that the sheriff cannot be made a trespasser by relation, as if he might still be regarded by the eye of the law as a wrong-doer in an action of trover. But if, instead of carping at particular expressions, the entire judgment be reviewed, which is necessary in order to give a consistent construction to the whole, (and for this purpose the reports of *Cooper v. Chitty* by Sir *James Burrow* and Lord *Kenyon* should be carefully compared together), I conceive it will be apparent that his lordship used the word "trespassers" because he was

speaking of the action of trespass, but that when speaking of the act itself, in contradistinction to the form of action, he never intended to designate the sheriff as a wrong-doer, so as to have incurred the guilt of a wrongful conversion. It cannot be disguised that in *Cooper v. Chitty*, as reported by Sir *W. Blackstone*, page 69, Lord *Mansfield*, in commenting upon the length of time which intervened between the assignment and the sale and the return, and stating that the notoriety was extremely great, is reported to have said, "but had the sale been immediately after the seizure, still the sheriff would have been liable." This, I conceive, must have been an inaccuracy of the reporter. No expressions of a similar import are to be found either in Sir *James Burrow's* or Lord *Kenyon's* notes, no such point was insisted upon at the bar, and it appears to be directly at variance with the whole tenor of his judgment, and with the declared opinion of all the same judges of the same court in *Timbrell v. Mills*, which occurred in *Hilary* term, 33 G. 2. about two years afterwards. (See Sir *W. Blackstone*, 205.) That was a motive to stay proceedings against a sheriff who had paid over to the assignees of a bankrupt, money levied under an execution, justifying himself on the ground, that the money levied was clearly the property of the assignees, according to the doctrine laid down in *Cooper v. Chitty*, *Michaelmas*, 30 G. 2. But the whole court declared "that it was allowed in that case that if the sheriff levies the money and pays it to the assignees before any commission issued, and without notice of the act of bankruptcy, he will at all events be safe." (a) In *Kitchen v. Campbell* (b), where money had and received was brought by assignees to recover, against a creditor, money levied under an execution sued out after an act of bankruptcy, but

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(a) 1 Sir W. Bl. 205.

(b) 2 Sir W. Bl. 827.

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before commission issued, and where the court proceeded on the ground that a judgment for the defendant in a former action of trover was a bar to an indebtedness *assumpsit* for the same cause of action, Lord C.J. *De Grey*, in delivering the judgment of the court, and commenting upon the title of the assignees to the property of the bankrupt by relation, is reported to have said, "yet notwithstanding this transfer of the property by relation, the sheriff is no trespasser by taking the goods under an execution after an act of bankruptcy and before the commission issued; so ruled in *Lechmere v. Thorogood*, in *Comberbach and Shower*, and in *Cooper v. Chitty*, in *Burrow*, 20. But by selling, (without explaining to his vendees whether he meant a sale before or after the commission,) the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee, and the plaintiff in the original action."

No authority is cited for the latter position, it was not a point in judgment before the court, and no mention is made of it in the report of the same case in 3 *Wilson*, 304.

The same principle which I conceive to have been established for a series of years, in the cases I have cited, appears to have been recognised by still later decisions in *Coppendale v. Bridgen and Another* (a), which was an action against the sheriff for a false return. The bankrupt was arrested on the 2d of *May* and lay in prison for two months, by which he committed an act of bankruptcy, which by relation was to refer back to the time of his arrest. On the 7th *June* a *fi. fa.* issued returnable on 26th *June*. On the 18th the sheriff seized and levied 292*l.* 7*s.*, and on 5th *November*, after the expiration of two months from the first arrest, he returned *nulla bona*. The question for

(a) 2 Burr. 819.

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the court was, whether such return could be deemed false with reference to the facts of the case. Lord *Mansfield* and the whole court were unanimously of opinion, that if the sheriff had returned that he had levied &c. and had actually paid the money to the plaintiff on the 26th of *June* (which was within the two months) he would have been excused, because it was impossible for him at that time to know that the defendant would lay in prison two months, and therefore he was under an invincible ignorance of this event. But the plaintiff could have no advantage by this, for still he would have been liable to refund the money, although the sheriff might be excusable in paying it to him. I regard this case as peculiarly strong in favour of the sheriff, who must have known that the trader had remained in prison seven weeks without giving bail, which afforded the strongest presumption of his insolvency, and a moral assurance that the imprisonment would terminate in bankruptcy. Yet being a public officer, the court declared he would be excused, although the plaintiff, to whom he had paid over the money, would be liable to refund to the assignees. So in *Lee v. Lopez* (a), which was money had and received by the assignees of a bankrupt against the sheriff to recover the proceeds of an execution at the suit of a judgment creditor, from which he claimed to deduct 140*l.* as a year's rent paid to the landlord. It did not appear from the judge's report whether that sum was paid by the sheriff to the landlord before or after notice of the bankruptcy; and the court held that the deduction should not be allowed unless the judge, upon reference to his report, should find such to be the fact. This case is another instance to prove that the payment by the sheriff without notice of the act of bankruptcy would be excused, although the party

(a) 15 East, 230.

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receiving it would clearly be liable to refund. All the cases I have cited admit that the property became the property of the assignees by relation from the time of the bankruptcy; but they admit also that the sheriff was excusable, by reason of the invincible ignorance under which he laboured as to the fact, whether an act of bankruptcy, which might be considered as inchoate, would ever be completed.

The last case I shall cite for the purpose of confirming the doctrine I have endeavoured to maintain, that the law will interpose its shield to protect officers and ministers of justice in the discharge of their duty, is *Smith v. Milles* (a). The question there, as in *Cooper v. Chitty*, was, whether the sheriff who had seized the goods of a trader under a fi. fa. after a secret act of bankruptcy, and sold them after the commission, but before the assignment to that plaintiff, could be considered a trespasser by relation. The court, consisting at that time of Mr. Justice *Ashurst* and Mr. Justice *Buller*, relied upon the authority of *Chitty v. Cooper* as conclusive upon the very point; and Mr. Justice *Ashurst*, in delivering the judgment of the court, refers to the cases of *Lechmere v. Thorogood*, and *Bailey v. Bunning*, as decisive to show that the officers shall not be made trespassers by relation. He says, "there is no instance where a man who has a new right given to him, which from reasons of policy is so far made to relate back as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him." He adds, "at all events the rule will hold with respect to officers and ministers of justice." If it be insisted that trespass, being a possessory action, can be supported only by proof that the plaintiff was in possession when the trespass was committed, and that therefore the gist of the action

(a) 1 T. R. 480.

failed; I answer, that if the right of property in goods becomes vested in the assignees by relation from the moment of the bankruptcy, such right of property would draw after it the right of possession, and so they might maintain the action, *Smith v. Milles* (a). I am aware it has been said that in modern times and within our own memory an opinion has prevailed with many learned men in *Westminster Hall*, that trover will lie, although trespass cannot be maintained; and numerous authorities have been quoted to warrant that position. I am constrained to acknowledge that the modern cases of *Potter v. Starkie* (b), *Lazarus v. Waithman* (c), *Price v. Helyar* (d), *Dillon v. Langley* (e), and *Balme v. Hutton* in the Exchequer chamber (f), are in direct contradiction to the principle I am to establish as prevailing throughout the earlier cases. *Potter v. Starkie* was ruled by Baron Wood at nisi prius in 1807, and was cited in the argument of counsel in *Stephens v. Etwall* (g). It is there said that the court of Exchequer in banc, in T. T. 1807, confirmed the opinion of Mr. Baron Wood, and held the sheriff liable in trover, though he seized, sold and paid over the money before the commission issued, and before any notice, saying, "this necessarily followeth from *Cooper v. Chitty* (h), for it was an unlawful interference with another's goods." So far from this following as a necessary inference from *Cooper v. Chitty*, Lord Mansfield considered the seizure in that case as a lawful interference to excuse the sheriff, but not lawful so as to support the act or prevent the property from being considered by relation as vested in the assignees from the moment of the bankruptcy. Next followed *Lazarus v. Waithman*, in

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(a) 1 T. R. 421.

(b) 4 M. & S. 260, M. T. 1807.

(c) East. T. 2 Geo. 4. 1820; 5 B. Moore, 313. (d) 4 Bing. 602.

(e) 2 B. & Adol. 131.

(f) Ante, Vol. II. 620.

(g) 4 M. & S. 260.

(h) 1 Burr. 20.

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which *Potter v. Starkie* does not appear to have been adverted to, but the judgment of the court proceeded upon the erroneous assumption that *Cooper v. Chitty* was a decision upon the very point. C. J. *Dallas*, Mr. Justice *Park*, and Mr. Justice *Burrough*, build their judgment upon the foundation of that authority. Mr. Justice *Richardson* indeed expressed himself in terms more guarded and qualified. He says, the law has been long since settled and has frequently occurred of late years at nisi prius, viz. "If a sheriff takes the bankrupt's goods in execution after an act of bankruptcy and before the commission, but sells them after it is issued, the assignees may bring an action of trover against him;" and concludes his judgment in these words: "Although the defendants might not have known that a commission was about to issue at the time of the seizure, it forms no excuse for them for having afterwards proceeded to a sale, viz. proceeding to a sale after notice." Mr. Justice *Richardson* therefore, if correctly reported, seems to have misconceived the most material facts of the case then before him in judgment, or he laid down a rule of law perfectly inapplicable to those facts, because there the execution being on the 15th *November*, the sale on the 21st *December*, and the commission not issuing until two days afterwards, and the assignment bearing date on the 6th of *January* following, the seizure and the sale were both before the commission. The case of *Price v. Helyar* (a), is undoubtedly also an authority in favour of the plaintiff, there being no fact in that case which places the sheriff in a more favourable position than the present defendant; and the court decided that he was liable in an action of trover brought by the assignees for selling the effects of a trader under an execution after a secret act of bankruptcy and before the

(a) 4 Bing. 602, East. T. 9 Geo. 4. 1828.

commission issued. In delivering the judgment of the court after much consideration, and after ascertaining from Sir *John Richardson* (who had been counsel in *Potter v. Starkie*) that the court of Exchequer had decided that case in the manner stated in 4 *Maule & Selwyn*, and gave the reason there assigned for their judgment, Lord C. J. *Best* says, "That case depended upon the previous decision in *Cooper v. Chitty*, and we think the case of *Cooper v. Chitty* embraces the principle upon which we now decide."

In all these cases, therefore, the judges profess to have squared their decisions by the rule laid down by Lord *Mansfield* in *Cooper v. Chitty*; but in justice to the memory of that great man I am bound to observe, that his masterly judgment cannot, without the abuse of language, be construed to bear the interpretation put upon it. I am aware that of late years this has been a prevalent opinion in some of the superior courts of *Westminster Hall*, and it may be said "communis error facit jus;" but unless I am tied and bound by the imperative language of an act of parliament, or by a series of authorities running in one clear and undisturbed current, I will never consent to subject a public officer to the injustice which such a decision must of necessity inflict upon him. The argument has proceeded from the distinction between trespass and trover; but as far as the sheriff is concerned I can perceive no substantial distinction between them; both impute to him the character of a wrong-doer, when he has been guilty of no wrong; and liability to either the one action or the other operates in effect penally upon him, the difference consisting only in degree. He exposes himself to punishment if he refuses to execute the writ, and if he executes it, to an action in which damages may be recovered to the full value of the property; although vigilance, caution, and pure good faith wait upon every

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step he takes in the discharge of his public duty. It may be said that the 6 G. 4. c. 16. s. 81., which enacts "that all executions and attachments against the goods of a bankrupt *bonâ fide* executed or levied more than two months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person at whose suit such execution or attachment shall have issued had no notice of any prior act of bankruptcy," has materially lessened the responsibility of the sheriff, and that the provisions of the late interpleader act, 1 & 2 Will. 4. c. 58. s. 6., which enables the sheriff to bring adverse claimants before the court, and compel them to litigate between themselves these controverted questions at their own peril, operate powerfully in his favour. It must be conceded that those enactments, which are of modern date, indicate an anxiety in the legislature to mitigate the severity of the law when found to bear oppressively on her ministerial officers; yet I apprehend they afford no solid argument for fixing on the sheriff a liability, which in my humble opinion is not warranted by any statute, or in accordance with the spirit and principles of the common law. If the question be asked, how could this opinion have prevailed for so many years, and have ripened into the authority of adjudged cases, unless built upon a solid foundation; I answer, that it may have originated in hasty decisions at *nisi prius*, in which great judges may have been misled by the popular treatises and publications of the day. In the early editions of *Cooke's Bankrupt Laws*, and so late as 1804, when the 5th edition was published, the author of that treatise observes, in p. 595, "That the sheriff who executes a *fi. fa.* upon the bankrupt's goods *after* an act of bankruptcy committed and *before* the issuing of the commission, is not a trespasser, but the assignees may maintain *trover* against him."

He then cites *Cooper v. Chitty*, *Smith v. Willes*, and *Cole v. Davies*, and adds, "It is true that formerly this seems to have been a litigated point, and much doubt was entertained upon the subject whether an officer executing the process of the courts is not so far justified thereby as not to be subject to an action of any kind." In the edition of *Bacon's Abridgment* published in the year 1798, by *Gwillim*, title Bankrupt (F), vol. i. 440, will be found the following note:—"It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution after an act of bankruptcy and before the issuing of the commission," (and for this doubt he cites *Bailey v. Bunning* in the different reports of *Levinz*, *Siderfin*, and *Keble*; and he adds, "But it is now settled that the assignees may in such case bring trover against him, (citing *Cooper v. Chitty*, 1 Burr. 20,) though the relation shall not operate so as to make him a trespasser." This I conceive to be an incorrect digest of the cases, and if *Gwillim* or *Cooke* had fortunately referred to the edition of Lord *Raymond* published by my brother *Bayley* in the year 1790, they might have corrected their own inaccurate analysis by the note of that learned editor in *Cole v. Davies* (a), which supplies all the information which the cases then afforded, and distinguishes between the points ruled and the obiter dicta, with a fidelity, accuracy, and nice discrimination peculiar to himself, which may be traced

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(a) 1 Ld. Raym. by Bayley, 725, note (a), is as follows:—"No action lies against the sheriff for a sale before commission; D. * Burr. 32, 34, 818; Bl. 829. If he sells the goods after the issuing of the commission is notorious, an action of trover may be maintained against him, R. † Burr. 20; Bl. 65; D. Bl. 1064; though an action of trespass cannot, R. 1 T. R. 475, [viz. *Smith v. Miles*.]"

* "Dictum." See 1 Com. Dig.

† "Resolved." See id.

being the value of such goods as were appropriated to pay the sheriff's poundage and costs. This is a question not between the lessees and the execution creditor, as to whom 21 *Jac.* 1. c. 19. s. 9. is, as it seems to me, conclusive, but it is between the assignees and the sheriff; and the difference between the execution creditor and the sheriff appears to me to make the whole difference in the case, and to make that which is clearly unjustifiable as to the former, excusable as to the latter.

By 21 *Jac.* 1. c. 19. s. 9., every creditor by judgment whereof no execution shall be served before such time as his debtor became bankrupt, shall not be relieved for any more than a rateable part of his debt with the other creditors of the said bankrupt; so that *Payne*, the execution creditor, would clearly be accountable to the assignees for the value of these goods, for the eight parcels which were to satisfy his demand, and for the five parcels he was to sell to pay the sheriff's poundage, and officers fees, and other expenses. Before 21 *Jac.* 1. c. 19., the rights of assignees stood upon 13 *Elix.* c. 7. s. 2. and 1 *Jac.* 1. c. 15. s. 5.; and it is probable that that provision was made in 21 *Jac.* 1. c. 19., because earlier statutes did not include it, or explain to what extent they ought to be carried. By 13 *Elix.* c. 7. s. 2. dispositions by the commissioners of the bankrupt's lands, goods &c. shall be valid, inter alia, against all persons claiming by, from or under the bankrupt by any act made or done after such persons became bankrupts. By 1 *Jac.* 1. c. 15. s. 5., dispositions by commissioners shall be valid against all persons claiming by, from, or under bankrupts, or any person to whom conveyances shall be made without consideration by the said bankrupt, or by his means or procurement. The question is, whether the sheriff does not stand in a different predicament, and whether

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his official character and duty do not arm him with an excuse. He acts, not of his own motion, but as a minister of the court from which the execution comes; he is not at liberty to act or not, as he thinks fit; it is his duty to act, and he may be punished if he forbear; and he acts not for his own benefit, but for the benefit of the execution creditor. He is the agent the law appoints to act for such creditor. He is commanded by the king's writ that of the goods and chattels of *Leonard* he cause to be made 607*l.* 5*s.*, which *Payne* had recovered by judgment against *Leonard*. *Leonard* has goods and chattels at the time in his possession and apparent ownership, and of which *Leonard* was the only rightful owner.

It is true, indeed, his ownership was defeasible, and under the bankrupt laws was liable to be defeated as to all persons claiming by, from, or under the bankrupt; but it would not be defeated unless an act of bankruptcy had been committed, and unless at the time of such act of bankruptcy there was some creditor or creditors competent to sue out a commission; and unless such creditor or creditors afterwards thought fit to sue out a commission. But how is the sheriff to come to the knowledge upon these points? If the creditors are watchful, they may find out if an act of bankruptcy has been committed, and apprise the sheriff; and if they are active, they may promptly sue out a commission; but to hold that the sheriff shall be responsible to them for not discovering what they did not discover, or even when they did discover, might conceal, is, as it seems to me, putting a sheriff, as an officer of justice, in a most unreasonable predicament. How is a sheriff to act? If he do what is his apparent duty, and seizes and sells, he is liable to be sued by the assignees. If he expects a commission and ventures to return nulla bona, he is sued by the execution

creditor. If he applies to the court for time to make his return, he must satisfy the court that there are reasonable grounds for apprehension. Till within comparatively a short period of time, there was no limitation. An act of bankruptcy of six years standing or more, if there were a petitioning creditor's debt of equal antiquity, would vacate any intermediate execution, and it would be no answer that creditors did know or might have known of the act of bankruptcy. And why is the sheriff, an officer of justice, to be responsible where the creditors are negligent? They have as good means as the sheriff of discovering whether there has been an act of bankruptcy. They can give the sheriff notice, if they have ground to suspect. If they are negligent, why should not the loss fall on them? I put these preliminary questions, because if the authorities are conflicting, they ought to be considered.

Bailey v. Bunning is the first case upon the point: it was twice before the court, first in *Trinity*, 6 *Car. 2.* (1666), about 38 years after 21 *Jac. 1.*, and again in *Pasch. 18 Car. 2.* The report of it is to be found in 1 *Keble*, 436, 932., 1 *Sid.* 271, and 1 *Lev.* 173; and again in *Pasch. 18 Car. 2.*, the report of which at large is in 2 *Keb.* 32, and the substance of the decision in 1 *Levinz*, 174. It was an action of trover. It was on the first of those occasions that the query mentioned in 1 *Siderfin*, 271, and 2 *Keble*, 982, was made. It was urged for the defendant, that he ought to be found not guilty, because he was but bailiff, and had performed his duty, and had not converted to his own use; upon which, according to *Siderfin*, the query is put: *Quære de cel. car il fuit affirme que le practice est, that the bailiff shall be found guilty if the party were there (adonque) a bankrupt.* 1 *Keble*, 932, explains by whom it was affirmed, *viz.* by *Wild*, king's serjeant,

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who said the constant course in *London*, in trespass against serjeants and bailiffs, was only to inquire whether the party was a bankrupt at the time of the taking. The query, therefore, in *Siderfin* is, as it seems to me, entitled to less weight, because it was made before the case received the full consideration it afterwards did, and was made by counsel only, and not by the court. Upon an attentive consideration of the different reports, there appears to me no difficulty in discovering what the court decided, and upon what ground. There was no difference as to the facts. On 6 *June* there was an act of bankruptcy, on which a commission issued on the 17th. On 11 *June* a fi. fa. was sued out tested the 4th, upon which a seizure was made on the 14th. The jury found a special verdict, in which they stated that the goods had been demanded of the bailiff, who had refused to deliver them; but this conclusion was special on the taking. If the taking was lawful, they found for the defendant; if not, for the plaintiff. This is now made clear by the reference which has been made to the record (a), and might before have been collected from 1 *Lev.* 174, and 1 *Keb.* 930.

It was urged, in the course of the argument, that the teste of the writ of execution, which was before the act of bankruptcy, bound the goods; but it was answered that that was not the case, except where the writ was tested on the day it issued, 1 *Lev.* 173, 174; 1 *Keble*, 933; 21 *Jac.* 1. c. 19. s. 9.; and that point was no further pressed. The case was then put, 1st, on the act of parliament; and 2dly, upon the special conclusion of the verdict. And upon the first the court and counsel agreed that the actual execution of the writ of fi. fa. was not sufficient to prevent a division among the creditors, 1 *Keble*, 931; and the court had no doubt as to the property in the goods, that they were liable by the express words of the statute, but the

(a) See ante, Vol. II. 622.

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doubt was, whether the relation should enure so as to make the sheriff punishable. *Butler* and *Baker's* case (a), the leading case on the effect of relations, was referred to, which lays it down that no relation, which is a fiction in law, shall make that tortious which was lawful, and that relations are to certain respects and purposes, and extend only to certain persons, "so that of two persons a relation may bind one and not the other; and the judgment was given for the defendant, he being an officer obliged to execute the writ, who could not know whether any act of bankruptcy had been committed, or whether any commission would be sued out." No one can, to my judgment, read 2 *Keble*, 32, and 1 *Lev.* 174, without seeing clearly that that, and that only, was the ground of the decision; and that the second point upon the special conclusion of the verdict formed no ingredient in the adjudication. Upon that point, however, I will just observe, that it had been held in the same term in which this case was before the court, in *Bruen v. Roe* (b), first, that a wrongful seizure is a conversion, and that an actual seizure of goods is a sufficient conversion, and that trover will lie upon it though there is no demand of the goods or refusal; and secondly, that when a demand and refusal are objected to in a special verdict, as being evidence only of a conversion, the proper course is not to give judgment for defendant, as was done in *Bailey v. Bunning*, but to award a venire de novo; 1 *Wilson*, 56. The case therefore of *Bailey v. Bunning* appears to me a distinct authority on the point now in question; it made the distinction between the title to the goods, which they held bound by the bankruptcy, and the officer, whom they held excusable in taking them, because he was not found to be cognizant of the bankruptcy; and it was explained by the court 18 years afterwards in *Philips v. Thomp-*

(a) 3 Cole's Rep. 25.

(b) 1 Siderfin, 264.

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son (a), as resolved solely in excuse of the bailiff, who ought to be excused for executing the writ, and not that the goods were bound by the writ. *Lechmere v. Thorogood* was decided in 1689. It is reported 1 *Shower*, 12, 3 *Mod.* 236, *Comb.* 123. It was trespass by the assignees of *Toplady*, a bankrupt, against the sheriffs of *London* and others, for seizing goods under a fieri facias against *Toplady*. The fieri facias was tested 27 *April*, but there was no seizure under it till the 29th, and in the interim, *viz.* on the 28th, *Toplady* became bankrupt; afterwards an extent issued, but that was held too late, so that the question was between the assignees and the sheriff. 3 *Mod.* 236, seems to me to have mistaken the question, and the ground on which the court proceeded. But *Shower*, who was counsel in the cause, and likely to know the true grounds of the decision, puts it upon the distinction between the officer and the party, that though the relation would enure against the latter, it would not against the former; and *Comberbach* puts it upon the same ground, that a construction should not be allowed to make the officer a trespasser by relation. *Shower's* report is this: "I argued it again upon this point—that though by the statute of bankrupts the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officers trespassers, who had a good authority, and took the goods lawfully, and so is the case of *Bailey v. Bunning*." The court clear, that the verdict was against the plaintiff, entire damages being given, and that this action lay not against the officers, though trover would against the party. *Comberbach's* account of the judgment is, "the court were of opinion, that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time; and *Bailey*

(a) 3 *Lev.* 192.

and *Bunning's* case, in 1 *Sid.* 271, agrees;" per *Holt* and *Dolben*. This, therefore, is another case in which a distinction is drawn between an officer and the party. It is said, however, that this was an action of trespass, and that upon the principle that a man shall not be made a trespasser by relation, trespass will not lie against an officer, though trover would. But does this case profess to proceed upon any distinction between trespass and trover, and is it not obvious that it proceeds upon the distinction between the officer and the party? and is there in reality any substantial difference between trover and trespass, and may not a man be made a trespasser by relation? For a seizure between the act of bankruptcy, and the assignment by a mere wrong-doer, by one who had no writ or colour for seizing, can there be a doubt but that the assignees, when appointed, might bring trespass? The same relation which enables an administrator to bring trespass for an act between the death of the intestate and the grant of administration, would enable them to do so; the goods, as against the wrong-doer, would have been theirs at the time of the seizure; the seizure, as against the wrong-doer, would have been an act of trespass, for which trespass would have lain against the wrong-doer. And why should not the same be the case as against the sheriff, except upon the ground that the sheriff stands in a different situation from a wrong-doer? And if he do, why should his protection be confined to the form of the remedy, and not be extended to the substance of the transaction? *Bailey v. Bunning* is in point, that it is to be extended to the substance of the transaction; and according to *Comberbach*, it is upon *Bailey v. Bunning*, *Holt C. J.* and *Dolben J.* rely; and in the note to *Turner v. Felgate* (a), which was an action of trespass, the difference between charging an officer and charg-

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(a) 1 *Lev.* 95.

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ing the party is noticed, and *Bailey v. Bunning's* case is referred to, where, he says, the officer shall not be charged, though perhaps the party should. *Smith v. Milles* (a) notices the same distinction between officers and ministers of justice and others; and *Lechmere v. Toplady* (b), in which the court seemed to think the judgment in *Lechmere v. Thorogood* a bar to a fresh action of trover, for the same cause seems to me to imply that there is no difference in this respect between an action of trespass and an action of trover. I think, indeed, that *Lechmere v. Thorogood* and *Lechmere v. Toplady* might both have been impeached, upon the ground that they were allowed to protect persons who were not officers; but as far as they protected the officers, I should have thought them right if the officers had pleaded separately.

Cole v. Davies (c) lays down the same distinction between the sheriff and any other person, as ruled by Lord Chief Justice *Holt* at nisi prius, *Hil. 10 W. 3:* and though Lord *Raymond* might then be young, his reports began at an earlier period, viz. *Pasch. 6 W. 3.*, and between four and five hundred pages of his reports, which show considerable powers, are before that period. The point there ruled was this:—If *A.* be bankrupt, and the sheriff, upon a fi. fa. directed to him against *A.*, seize and sell the goods, and a commission of bankruptcy is then granted, the assignee of the commissioners may maintain trover against the vendee of the goods, but no action will lie against the sheriff, because he obeyed the writ; and whoever will take the trouble to look into the edition of 1790 will find that the then editor (d) entertained that opinion of *Cooper v. Chitty* which I entertain now. That case, as I have always understood it, is, in my judgment,

(a) 1 T. R. 480; Cooke's Bankrupt Law, 606.

(b) 2 Vent. 169, and 1 Show. 146.

(c) Lord Raymond, 724.

(d) The learned baron himself.

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conclusive of this. It proceeds, as it seems to me, not merely on the distinction of trespass and trover, though that distinction, in cases where the facts warrant it, may exist; but upon two other distinctions, one between the sheriff when acting in ignorance, and therefore free from blame, and other persons; and the second between a sheriff acting upon ignorance and a sheriff acting with notice; and Lord *Mansfield* seems to have considered a sheriff when acting in ignorance excusable for whatever he did while in such ignorance, whether by seizing or selling, though other persons would have been answerable; but as having no excuse, when he acted upon knowledge. And in that case he held the seizure by the sheriff, when in ignorance of the bankruptcy, though not lawful, yet excusable; and he held the subsequent sale by the sheriff, when he had full notice of the bankruptcy, not excusable, but a wrongful conversion, because of that notice. This, to my reading, is the substance of *Cooper v. Chitty*, and how it can be brought to bear upon a case in which the sale by the sheriff is in ignorance, and therefore innocent, I cannot see. And here I may be allowed to correct a mistake into which a learned judge (*Park J.*) is represented to have fallen (*a*), and for which explanation I am satisfied no one will be more thankful than that learned judge; he is supposed to have thought that the judgment delivered in the Exchequer had charged Lord *Mansfield* with a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in eight lines. I was sure that no such charge was intended, and on reference to the report I find no such charge made. What the report states to have been said was (*b*), "unless Lord *M.* meant to convey the notion of perfect indemnity to the officer where there was perfect ignorance,

(*a*) See *ante*, Vol. II. 638.(*b*) *Id.* 34.

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he made a very useless display," &c. But so far from thinking that he had made a useless display, the impression was, that he had most carefully investigated the authorities and explained their bearings, and had thereby established the position, that where there was perfect ignorance there ought to be and was perfect indemnity to the officer.

The distinction in *Cooper v. Chitty* between trover and trespass I take to be this; that in trespass the taking is the gist, and therefore there must be a wrongful, *i. e.* an inexcusable taking; but that in trover the conversion is the gist, and therefore that a wrongful, *i. e.* an inexcusable conversion is sufficient, though the taking was excusable; but that the conversion might be deemed excusable even in trover, and would in that case be an answer to the action, I think may fairly and clearly be collected to have been the impression on Lord *Mansfield's* mind. Let me, however, examine his judgment, that I may see whether I come to a right conclusion. He begins by defining the action of trover, and describes two things as requisite, *i. e.* property in plaintiff, and a wrongful conversion by defendant. He considers the property in the assignees from 4 Dec. before the seizure, and then says (a), "The only question then is, whether defendants (the sheriffs) were guilty of a wrongful conversion. That the conversion itself was wrongful is (he says) manifest. The sheriffs had no right to sell the goods of the plaintiffs, the assignees, but of *William Johns* only. The vendee would have no title to the goods, the plaintiff in the execution no right to retain the money." Still he thinks something more is to be considered before the conclusion is reached that the sheriffs are responsible, and the action against them maintainable. "If the thing be clearly wrong, the only question remaining is (so that he thought there was a question behind), whether the defendants

(a) 1 Barrow, 32.

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are excusable, though the act of conversion be wrongful." He then notices that the bankrupt statutes do not make men trespassers or criminal by relation, who have innocently received goods from him, or executed legal process not knowing of an act of bankruptcy; that was not necessary and would have been unjust. He then notices that the injury complained of was not the seizure, but the wrongful or injurious conversion by the sale; and then proceeds to show that the sheriff's sale was not in ignorance, but with full knowledge twenty days after the commission and assignment. The sheriffs, therefore, did not come within the rule he had mentioned, of an officer's executing legal process not knowing of an act of bankruptcy. They were, therefore, not excusable; they had acted with full knowledge of the bankruptcy. Now to what purpose was the consideration whether the sheriffs had knowledge, if they would be equally liable, as is contended here, though they had no knowledge. Lord M. then proceeds to answer the objections that had been taken, and particularly this, "that the taking was lawful, and therefore the sheriffs were bound to complete it by a sale;" to which he replies, "that the taking was not lawful, because they were then the goods of the assignees, and if the taking were lawful, the sheriffs should not have gone on when the discovery was made." He then proceeds to explain how far the taking was to be deemed lawful, and how far not, in a way which to me is conclusive of the present case. "To support the act, he says, it is *not* lawful; but to excuse the mistake of the sheriff through unavoidable ignorance, it is lawful (a)." In other words, the relation introduced by the statute binds the property, but men who act innocently at the time are not made criminals by relation, and therefore they are excused from being punishable by action or indictment as trespassers. What they

(a) 1 Burrow, 35.

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did was innocent, and in that sense lawful. But as a ground to support a wrongful conversion by sale, after a commission publicly taken out, and an actual assignment made, it was not lawful. He then notices *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, and the points established by them in favour of the sheriff; and after a caution against placing too great a reliance on *Cole v. Davies*, he says, "besides the case there put is of a sale by the sheriff before the commission, and the conversion might be as excusable as the taking, because he obeyed the writ; whereas here the goods were not sold till after both commission and assignment." Now how the conversion could be excusable, except on the ground I have stated, I cannot see. In conclusion Lord *Mansfield* says, "the seizure here is after the act of bankruptcy committed, and therefore after the property is vested by relation in the assignees; but that was innocent and excusable, and the sheriff shall not be liable by relation as a wrong-doer." The gist of this action is the wrongful conversion by the sale and false return long after the commission and assignment. Now if ignorance at the time of taking will excuse the seizure, I cannot see, upon principle, why ignorance at the time of selling should not excuse a sale; and the reference by Lord *Mansfield* to *Bailey v. Bunning* and the other cases, and his observation, after citing *Cole v. Davies*, seems to me to show, as plainly as conduct and words can show, that ignorance would equally excuse both. I am, therefore, of opinion, that *Cooper v. Chitty*, instead of being an authority for the plaintiff below, or standing indifferent, is a very strong authority — an authority in point for the sheriff.

Smith v. Milles (a) was trespass against the sheriff for seizing the goods of the assignees on 23d Feb. 1786.

(a) 1 T. R. 475; Cooke's B. Law, 666.

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The sheriff pleaded not guilty, and justified under a *fi. fa.* against the bankrupt. The plaintiffs proved an act of bankruptcy on the 1st *Feb.*, and a sale by the sheriff after the commission, and in defiance of notice, but before the assignment to the plaintiffs. Defendant demurred to the evidence. The question principally discussed at the bar was, whether the assignees could be considered as having such a possession at the time of the seizure as would enable them to maintain trespass; for it was admitted that the sale would have been a sufficient foundation for an action of trover; but it was also said *arguendo* that the sheriff ought to be better protected than any other wrong-doer, for he is compelled to do his duty, and does not act from his own choice. The court, consisting only of *Ashurst* and *Buller* Js., thought the point settled by *Cooper v. Chitty*, and decided in favour of the defendant; first, on the ground that where a new right is given, which, from reasons of policy, is made to relate back to avoid all mesne incumbrances, the party shall not be taken to have such a possession as to bring trespass for an act done before such right was given him: but at all events, secondly, on the ground that the rule would hold with respect to officers and ministers of justice; for which *Ashurst* J. cited *Lechmere v. Thorogood*, which was trespass; and added, the same doctrine is recognized in *Bailey v. Bunning*, which was trover. He quotes also the passage from *Cooper v. Chitty*, which shows on what ground a wrongful conversion would make trover maintainable, where trespass would not lie, because the conversion is the gist of the action of trover; and the action will equally lie, whether the taking were excusable or not; whereas the taking is the gist of the action in trespass, and if the taking be excusable, the action cannot be supported; and he concludes, "the plaintiffs are not injured, as it is competent to them to recover the value

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of the goods by bringing an action of trover," (there being clearly in that case a wrongful conversion by the sheriff, which as against him could not be deemed otherwise than wrongful;) "but the officer shall not be harassed by this species of action (*i. e.* trespass) in which the jury might give vindictive damages."

The distinction, therefore, which I have mentioned between the sheriff and other officers of justice on the one hand, and other persons on the other, as first established in *Bailey v. Bunning* in 1668, is recognized in *Phillips v. Thompson* in 1685, is acted on in *Lechmere v. Thorogood* in 1688, is adopted in *Cole v. Davies* in 1698, is again recognized in *Cooper v. Chitty* in 1758, and in *Smith v. Milles* in 1786, and is never, during that period, questioned or impeached; and it seems to me that it ought to continue a guide for our decision, unless we find it satisfactorily overruled, and unless we feel a conviction that it is founded upon untenable principles. The first case that I am aware of in which this distinction was disregarded is *Potter v. Starkie* in the Exchequer, Mich. term 1807 (a). In *Wyatt v. Blades* (b) the distinction certainly was unnoticed. The only question made was, whether a removal of the goods by the sheriff to a broker's was a conversion, and Lord *Ellenborough* held it was. In *Lazarus v. Waithman* (c), *Bailey v. Bunning* and *Phillips v. Thompson* were certainly cited at the bar, but neither of them is noticed in the judgment of the court; and as the case was at once disposed of by the refusal of the rule nisi for a new trial, there was no interval before the case was disposed of for looking into the authorities. *Lee v. Lopez* (d) is in favour of the distinction I

(a) 4 M. & S. 260.

(b) 3 Camp. 296 (1812).

(c) 5 B. M. 313.

(d) 15 East, 230 (1810). See 9 B. & C. 700.

have mentioned rather than against it. The sheriff seized and sold, after a secret act of bankruptcy. The goods produced 520*l.*, the sheriff paid the landlord a year's rent, 149*l.*, and whilst the money was in the sheriff's hands the assignees brought an action against him for money had and received. The right of the assignees to the bulk of the money was clear; the only question was, whether the sheriff had a right to deduct the 140*l.*; and the plaintiffs had a verdict, with liberty to add that sum to the damages. Rule nisi accordingly; and upon cause shown, it not appearing whether payment was before notice of the commission or not, the court inquired how that fact was, and the counsel not being able to answer the question, the court said it was for the defendant, the sheriff, to show that the payment was before notice of the commission, and they ordered the addition, unless the judge's note should show such was the fact. As against the sheriff, therefore, the point was put, not on the time of the act of bankruptcy, but on that of notice of the commission. In *Price v. Helyar* Lord Chief Justice *Best*, in delivering the judgment of the court, goes no further back than *Cooper v. Chitty*, and notices none of the earlier cases; and though it is stated in *Moore and Payne* that *Bailey v. Bunning* was cited, it is not cited in detail, nor noticed in the judgment. *Dillon v. Langley* merely follows *Potter v. Starkie*, *Lazarus v. Waithman*, and *Price v. Helyar*.

As to the principle on which an exception in favour of a sheriff, when he acts ignorantly and innocently, is grounded, I have noticed it in the early part of the opinion I have been delivering. I can see nothing in it to which legal objection can be made. It is founded on this, that a relation shall work no wrong—that it

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may bind one person where it does not bind another, and that the relation under the bankrupt laws, though it binds other persons, will not bind a public officer where he acts under the king's writ, and where what he does is, at the time he does it, in strict obedience to the king's writ, and warranted by it, and where it is only by a relation resulting from subsequent facts that what he has done can be impeached.

I will only add, that until a limitation was put upon this relation by modern statutes, the sheriff, if liable at all, would have been liable though a commission were not issued until five or six years after he seized, and that if the creditors are not watchful, so as promptly to discover the act of bankruptcy, and active, so as speedily to issue a commission, I can see no satisfactory reason why they should not lose the security of the sheriff. My opinion therefore is, that the judgment as to all but 5*l.* ought to be reversed.

DENMAN C. J.—The question is, whether a sheriff, who under a *fi. fa.* seizes and sells a debtor's goods after a secret act of bankruptcy, but before a commission, thereby renders himself liable to an action of trover for the value of the goods taken.

Looking first at this question, with reference to authorities, it appears to me quite clear that the court of King's Bench, in *Bailey v. Bunning*, decided both *Balme v. Hutton* and the present case (for they are identical) in favour of the sheriff. I am aware of the acute observations lately made on the form of the record in the first-mentioned case, but they were not the grounds of the decision, nor do they appear to me well founded in themselves. Chief Justice *Kelynge*, and *Windham* and *Twisden*, justices, do not say that a sufficient conversion is not stated; and I do not see how they could have said so when the defendant is

alleged to have taken and detained the goods in defiance of a demand to surrender them; and though demand and refusal are not the fact of conversion, but only evidence of that fact, the statement of a demand and refusal cannot do away the taking and keeping previously set forth, which are a conversion. But those learned judges do say that the bailiff was justified, being an officer obliged to execute the writ, who could not know whether an act of bankruptcy had been committed, or whether a commission would issue. They therefore in substance held that trover would not lie, because the conversion, though complete, was lawful. This was the point in *Balme v. Hutton*, decided in the affirmative by the court of Exchequer, and in the negative by the court of Error; negatived also by the court of Common Pleas in *Carlisle v. Garland*, on which the present writ of error is brought. Of the twofold case of *Lechmere v. Thorogood*, with the cases of *Turner v. Felgate*, *Phillips v. Thompson*, and *Cole v. Davies*, it is enough at this moment to say, that some appear to me to proceed upon the authority of *Bailey v. Bunning*, and the others to recognize and adopt it. If then the case of *Cooper v. Chitty* had been in its facts precisely similar to these, I should have thought all the then existing authorities full in favour of the defendant, and I am satisfied that it would have been decided in conformity with them. It differed in particulars of less importance than that the sale was made after commission, assignment, and notice; it was the case of a sheriff who took upon himself to deal with the goods of a debtor after he knew that they had become the property of the debtor's assignees. A decision for the plaintiff did not in the least interfere with those former authorities, on some of which Lord *Mansfield* took the opportunity of throwing a degree of discredit. His lordship deprecated the authority of

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Leckmere v. Thorogood, on account of the reporter's inaccuracy in ascribing to Chief Justice *Holt* opinions which that great judge is supposed to have been incapable of holding, so erroneous are they declared to be. "Lord Chief Justice *Holt* could never say that the property of the goods is vested by the delivery of the *fi. fa.* and the extent, for the king afterwards comes too late; no inception of an execution can bar the crown." Such is Lord *Mansfield's* observation.

But is this proposition so manifest an error? So far from it, Lord *Kenyon*, in *Rorke v. Dayrell* (a) states it to be the law, and doubts in his turn whether Lord *Mansfield* could have committed the error of denying it, and thinks that Sir *James Burrow* must have misreported him. Fortunately, however, for *Burrow's* credit, Lord *Kenyon* himself, when a young man, had taken a note of Lord *Mansfield's* judgment, which has since been published, and which agrees with that report. In a late case Lord *Ellenborough* inclined to Lord *Mansfield's* opinion on this point; but however it may be decided when it shall have undergone such discussion as such a difference requires, the proposition imputed to *Holt*, and re-asserted by *Kenyon*, is clearly not so absurd as to invalidate the report which contains it.

Cole v. Davies was indeed a *nisi prius* decision, but it was unquestioned; it was that of *Holt* C. J. fully aware of the former and then recent cases, and knowing the views both of his brother judges and of the profession. The case is reported by another chief justice, Lord *Raymond*, whose authority as a reporter at least should have seemed beyond attack. Yet Lord *Mansfield* speaks slightly of it, observing, that Lord *Raymond* was young when he took these notes, and that they

(a) 4 T. R. 402.

are too incorrect and inaccurate to be relied on. But is it really possible to believe that Lord *Raymond* was too young to understand what he heard? If not, his youth is immaterial in the argument; and are we then to discard as inaccurate and incorrect all that he reported in the first half of his first volume during the five years preceding? I cannot refrain from saying, that we can rely upon none of our reports, if we admit a doubt that *Raymond* has recorded *Holt's* genuine doctrine, and that he understood it fully.

Lord *Mansfield's* censure of these two cases is rendered the more remarkable by his labouring, and with success, to demonstrate their perfect consistency with the judgment he was at that time pronouncing. *Lechmere v. Thorogood* (a) decided, that though by the statute of bankruptcy the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officers trespassers who had a good authority and took the goods lawfully; and trespass lay not against the officers, though trover would against the party. So in *Cole v. Davies* (b). If A. was a bankrupt before the seizure, and the sheriff seize and sell his goods, and commission and assignment follow, the assignee of the commissioners may maintain trover against the vendee of the goods, but no action will lie against the sheriff because he obeyed the writ.

In the great case of *Cooper v. Chitty* the special verdict stated very few facts—an act of bankruptcy—a writ of execution—seizure by the sheriff—a commission and assignment—notice of both to the sheriff—a sale by him. That was the order of events.

The former cases had laid it down, that seizure before commission would not maintain trespass. The

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(a) 3 Mod. 236; 1 Show. 12; Comb. 123. (b) Lord Raym. 724.

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court decided in *Cooper v. Chitty*, that a sale after notice of assignment would maintain trover.

Whether the intermediate state of things that has occurred in *Balme v. Hutton*, and in the case before us, a seizure and sale after act of bankruptcy, but before commission, would support trover, was not in question; and most of the learned judges who overruled the Court of Exchequer have admitted in plain terms that *Cooper v. Chitty*, as a case, is no authority for deciding the present. Some indeed who gave their judgments recently in the court of Exchequer Chamber, and more of their learned predecessors who adopted the same opinion, undoubtedly conceived *Cooper v. Chitty* to be a case in point. It was distinctly so stated by the eminent person who delivered the only considered judgment of a court on this point, I mean the Lord Chief Justice *Best*, who expressly grounds his decision in *Price v. Helyar*, on the authority of *Cooper v. Chitty*. Many of Lord *Mansfield's* observations, and more particularly those which tend to disparage the former authorities, may be fairly urged as evincing a disposition on his part to depart from them. But, with all possible veneration for that illustrious judge, I cannot agree that observations and reasonings not required for deciding the point at issue, ought to have the influence which has been so confidently claimed for them here. On the present occasion I may be allowed to say, that no man is more inclined to defer to judicial authority than myself; and I go much further, for I think whatever has fallen from the sages of the law, in the course of considering points submitted to them, entitled to the most respectful consideration. I cannot, if I would, divest myself of such feelings for understandings of that superior order, enlightened by general learning and rendered acute by experience and practice. I dissent with caution from any proposition embraced by them,

and distrust every conclusion of my own, at which they have not arrived. But that the extra-judicial sentiments of the latter judge should overcome any confidence in the well-considered principles judicially established by former magistrates of equal name, a just respect for judicial authority itself forbids.

Sir *W. Blackstone* indeed imagines Lord *Mansfield* to have actually said, in some part of the judgment delivered by him in *Cooper v Chitty*, that "the sheriff would have been liable, though the sale had been immediately after the seizure." But this inference is not drawn by his lordship in the other reports of *Cooper v. Chitty*; that it was not drawn by the profession, is made manifest by *Blackstone's* own note, as well as by the case there cited of *Timbrell v. Mills*. It may be permitted me to pass over a long list of cases, *Coppendale v. Bridgen* (a), *Aldridge v. Ireland* (b), *Vernon v. Hankey* (c), which appear to me, for the reasons detailed in *Bulme v. Hutton*, to sanction the principle of the older cases, which was also recognized by *Smith v. Mills*, to the extent of relieving the sheriff from an action of trespass, even where a commission had preceded the sale.

It cannot however be denied that an opinion adverse to the ancient doctrine must have been all this time growing up in the profession. Particular phrases employed by Lord *Mansfield* in *Cooper v. Chitty*, seem to have been more regarded than the decision itself, and the pains taken by his lordship to guard against collusion with that doctrine. This growing opinion has been spoken of, by some whom I highly respect, as a kind of authority to which courts of justice ought to defer; and I willingly admit that an opinion universally entertained at the bar is very likely to be correct, and is not to be contravened without great caution. But the

(a) 2 Burr. 814.

(b) 1 Taunt. 275.

(c) 2 T. R. 113. .

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opinion to which I now allude has proceeded upon, at least it has been accompanied with a remarkable error now almost universally acknowledged to be such—the error of supposing that the decision in *Cooper v. Chitty* was at variance with the old cases. Nor has this opinion been universal in *Westminster Hall*, for the learned counsel for the plaintiff in error referred to text writers who published their dissent. One distinguished person still I hope far removed from enjoying his full authority as a sober, careful, accurate, and conscientious inquirer after truth, can never be mentioned even in his presence in colder terms of commendation. I need not add, that I am speaking of my brother *Bayley*, who, in his character of editor of Lord *Raymond's* valuable reports, laid down the law as he conceived it to exist in 1790, in strict conformity to the old decisions.

But any opinion that had been shown to have become universal, must, if correct, be founded on just legal principles, and ought to have no other weight than it derives from them; and if it could be traced to no such principles, but on the contrary was shown to originate in a misconception of one decision, and neglect of others, it would be entitled to no weight at all; and the proof of its being founded in error would undermine the decisions resting upon it. I think every decision may be properly submitted to such examination; indeed it must, where difference of opinion exists. The opportunity of making it is that which gives their greatest value to the full reports now in the hands of the profession.

The opinion admitted to have grown up after *Cooper v. Chitty*, clearly appears to have influenced the learned judges who decided *Potter v. Starkie*, *Lazarus v. Waithman*, and *Price v. Helyar*; cases which I do not examine in their several details, because

I cannot deny that they are direct authorities against the plaintiff in error.

The case which we are now considering was before the court of Common Pleas in *Hilary* term 1831, as *Dillon v. Langley* was before the King's Bench in the *Easter* term of that year. Both were decided entirely out of deference to the class just alluded to. The present case was not even argued at the bar, the learned serjeant who appeared for the defendant not thinking himself justified in making the attempt, after the recent decision of the same court in *Price v. Helyar*.

In *Trinity* term, in that very year, the case of *Balme v. Hutton* was brought before the court of Exchequer on a special verdict found by the jury on a second trial. After having taken time to consider, the court pronounced the sheriff not liable in trover, under circumstances exactly similar to those now before us. Their judgment will be allowed to exhibit a patient and acute examination of authorities, combined with perspicuous reasoning upon them. It was unanimous. It has been revised in the court of error from that court, and has been reversed by a majority of six learned judges against one, all devoting equal care, learning and talent, to the argument. Lord *Tenterden* was present at the discussion at the bar, and though his lamented death took place before the decision, the weight of his great authority must be added to the scale which then preponderated.

If we look back from the present period to the reign of *Charles* the Second, it must be confessed that the history of this point exhibits an unusual array of great names and authorities on either side.

From this consideration, and from observing the process of reasoning employed, as well as the very peculiar position of the other recent cases in *Westminster Hall*, I have been led to think the question

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still open to inquiry, and have done my best to investigate it upon principle. No conclusion could have been altogether satisfactory to my own mind, since none could have escaped collision with some of our most venerated predecessors and ablest contemporaries: and I may add, that not insensible to the inconveniences of throwing doubt on the prevailing practice and opinion, the strong inclination of my mind was, to concur with the latest authority.

But I am bound to avow the opinion I have formed, which is, that in this case the sheriff is justifiable in seizing and selling the bankrupt's goods. I think him justified, because he did both in obedience to a lawful authority, which it would have been criminal in him not to obey. He was commanded to seize the bankrupt's goods, and he seized them, and the command being lawful, he was no trespasser. He was commanded to sell the goods so seized; for the same reason, that sale cannot be a wrongful conversion. He was lawfully commanded to pay the proceeds to the execution creditor; and that also, in my opinion, he might lawfully do. His conduct was in all respects lawful at the time he acted; can it be made unlawful by the accidental existence of a fact unknown to him, and by other facts occurring afterwards without his participation or knowledge? I think it cannot. If it could, the law would indeed be hard and unjust, not to say monstrously iniquitous, and more especially before the 49 G. 3. But if such be the law, it is not to be defeated by courts appointed to carry it into effect, from those or from any such considerations, and my judgment proceeds not on the hardship or injury that might accrue to parties, but because the law would be in my opinion (and I must employ the only language that strikes me as appropriate) incongruous and absurd. The sheriff must take care to seize the debtor's goods.

He must inquire which are the debtor's goods, and if he takes those of any other he is answerable. But in the present case he does take the debtor's goods and no other man's. The more diligently he inquires into that fact of property, the more clearly would it be proved, not only are they his at the time of seizure, even though an act of bankruptcy may have been committed, but they may continue so to his life's-end. A most ingenious illustration was employed to show how property belonging to a debtor at the time of seizure is affected by an act of bankruptcy, which was likened to a stamp or mark, invisible when set there, but brought to light by the commission and assignment (a). This kind of analogy sometimes furnishes a conclusive test. Pursuing it here for a moment, we perceive the king's lawful command written in legible characters, expressed in plain words, unconditionally directing the seizure and sale of A.'s property. The duty of the officer thus addressed should appear to be unambiguous. But it is not impossible that the goods may have received a mark undiscoverable to his eyes. There is a second possibility that the mark may be brought out hereafter; and a third possibility that another contingent event may supervene, which would bring the inscription into full light, and even change the nature of the subject-matter; at least an equal probability exists that no mark is there, that it may never become visible or lead to the change. Can it be that the same law should enjoin one of its officers to execute that duty, and then punish him for doing so?

Lord *Mansfield*, and some later judges, in conformity to the language of ancient cases, allow that the sheriff shall be protected by his writ against an action of trespass; but I humbly conceive the writ to be an equally good protection to him in trover; for if it makes the seizure lawful it cannot leave the conversion

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wrongful—a distinction which is here taken, appears to me wholly gratuitous, founded on no legal ground and inadequate to its purpose. He shall be protected (it is said) against vindictive damages, which might be awarded if trespass were the form of action; but in trover where the question of property is said to be the only one, and the damages to be limited by the value of the goods taken, he is responsible. I do not pause to ask why, if he has done an illegal act, he should not answer to the full extent of injury arising from it; but the proposition, that in trover the damages must be restricted to mere value, seems to me, speaking with all diffidence, to require proof; it would place detinue and trover on the same footing; but inasmuch as the latter form of action enables a plaintiff to recover for the wrong done, I conceive that no legal bar exists to his obtaining damages fully commensurate to his loss, if his declaration be properly framed to include them.

When it is intimated, as a consequence of denying the sheriff's liability, that the execution creditor must also escape liability, I wish to express some doubt whether, even if that were so, any absurdity would follow where all has been done before the issuing of the commission. Most commonly the execution creditor not only directs the sale, but keeps the proceeds, and doing either after the commission is liable either in trespass for seizing the goods, in trover for converting them, or in assumpsit for keeping the money to which the assignees have become entitled.

That he could be liable, if he put the sheriff in motion before a commission without ultimately obtaining the fruits of the execution, I am not prepared to affirm, but need not for any purpose of the present case dispute. It is in this way, as I conceive, that effect is to be given to 6 G. 4. c. 16., following as it does, without material variation, the antient bankrupt laws. The

property is changed certainly by the assignment from the moment of the act of bankruptcy, but for what purpose changed? for the purpose of giving the assignees an absolute interest in the property wherever it may be found, and securing to the creditors the benefit of every portion of it. They may compel its surrender from any hands, and make all who have raised money upon it account for that money to the bankrupt's estate. But a change in the property for this purpose cannot, as I apprehend, have the effect of visiting with damages as wrong-doers, such as acted lawfully with respect to the property, and were compelled by the exigency of the law to act as they did.

The doctrine of relation cannot, as I apprehend, be carried to this extent. I do not see on what principle, by varying the right of property at a by-gone period, the legality of personal acts already done can be affected. Sir *Edward Coke*, in the well-known passage often cited from *Butler* and *Baker's* case, imposes limits on the doctrine of relation, which are essential to prevent its working injustice; "relations shall never be strained to the prejudice of a third person;" like other fictions of the law, they are to certain respects and purposes, and extend only to certain persons. Further, it was said "inasmuch as relations are fictions in law which will never do wrong," that "no relation shall make that tortious, which was lawful."

The relation created by this clause of the bankrupt act has indeed been pronounced no fiction; I conceive it to be such in causing the property to have resided in two different persons at the same time, and making that belong to the assignees from the act of bankruptcy, which at that time did belong and might have continued to belong for ever to the bankrupt. *Coke's* doctrine therefore applies, and I confess it appears to me decisive of the present question. And while the

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relation changes the property in the respect, and for the purpose of giving the assignees the complete beneficial interest in it from the time of the act of bankruptcy, it ought not to be strained to the injury of a third person, nor render tortious that seizure and that sale by the sheriff, which were lawful when done.

It may be observed as by no means the least singular circumstance attending this remarkable case, that the doctrine, while in controversy, has become naturally obsolete, by the operation of that useful reform introduced by Lord *Tenterden* into parliament, the interpleader act. The more general principles, however, and the analogies to be drawn from them, may still have an important influence on other cases.

On this special verdict my opinion is, that the defendant in error is entitled to our judgment for *5l.* only.

Judgment affirmed.

IN THE EXCHEQUER OF PLEAS.

SANDLAND *against* CLARIDGE.

Though a scire facias on a recognizance of bail cannot be tested before the return day of the *ca. sa.* against the principal, it may after.

The four days for which it must lie in the sheriff's office need not be in term.

J. *JERVIS* moved to set aside a writ of scire facias issued against bail on their recognizance, and all proceedings thereon, for irregularity. The return of the *ca. sa.* against the principal was 4th *May*, the teste of the *sci. fa.* was 8th *May*, the last day of *Easter* term, returnable on 25th *May*, the 4th day of this term. It was lodged with the sheriff of *Middlesex* on 13th *May*, and the bail were duly summoned. The irregularities relied on were, first, that the *sci. fa.* was not tested on the return day of the writ; and secondly, that it was not left four clear days in term at the sheriff's office. He cited *Tidd*, 9th ed. 1098, 1125, 1126. *Dax's Practice*, 1st ed. 123, on the first point; and on the second, *Tidd*

1098, and *Dax*, 123. Notice of the motion having been given,

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Crompton showed cause in the first instance. On the second point, Mr. *Dax*'s work does not lay down that the sci. fa. must lie in the sheriff's office for four days in term, but for the last four clear days before the return, exclusive of the day it is lodged, of the return day, and of *Sundays*. [*Bayley* B. If the scire facias be returnable the first day of term, how can the four days, during which it is to lie in the office before its return, be in term?]

As to the other point, the cases only show that the sci. fa. must be tested on a day in term; it cannot be tested before the return of the ca. sa. against the principal, because the cause of action has not then accrued against the bail, but it may be tested on or after it, viz., after the cause of action has so accrued. But whether the plaintiff proceeds on the recognizance by scire facias or in debt, there is nothing to compel him to sue out process on the day he acquires a right to sue. Here, the bail were spared by not being sued till four days after they became liable, so that the question, whether it might be sued out on the return day, which in *Stewart v. Smith* (a), and *Shivers v. Brooks* (b), was held in the affirmative, does not arise.

J. Jervis in support of the rule cited the same authorities, and referred to the officers of the court that by the practice the sci. fa. is to be tested on the return day of the ca. sa.

LORD LYNTHURST C. B.—The master states to us that it has been usual that the writ of sci. fa. should be

(a) Lord Raym. 1567 ; Stra. 866, S. C.

(b) 8 T. R. 628.

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tested on the return day of the ca. sa., but does not certify it as the practice of the court, or state it to be necessary that it should be so tested. The authorities show that it may be so tested, not that it must.

Rule discharged with costs, (as moved).

CORFIELD *against* PARSONS.

Where a question arose as to the identity of the plaintiff with a person who appeared in a dressing gown in the passage of the plaintiff's house near the street door, and asked a party who called to make an inquiry from the plaintiff as to the solvency of an indorser of a bill, "what his business was:" Held, first, that without further evidence of who the person was, his identity with the plaintiff was not sufficiently established to let in evidence of what he said on that occasion; and secondly, that it was for the judge and not for the jury to decide whether the identity was sufficiently proved, for the question of identity was preliminary to the admissibility or rejection by him of the declarations of the person sought to be identified with the plaintiff.

ASSUMPSIT on a promissory note by the second indorsee against the maker. Plea: non assumpsit. The following facts appeared among others at the trial at the *Middlesex* sittings in last *Easter* term, before *Gurney* B. The plaintiff had given value to the prior indorser for the note in question, which had been given by the defendant to the prior indorser in part discount of a bill of a larger amount; and part of the defence was, that before the note was delivered in such part discount, the defendant directed a person to inquire of the plaintiff as to the solvency of the prior indorser. That person swore that he called in consequence at the residence of the plaintiff, an attorney, and that on the opening of the street door, a man in a dressing gown, before and since unknown to the witness, asked him his business. The witness thereupon communicated it. The witness was then asked what that person said to him, and on objection, *Gurney* B. overruled the question, as it had not been shown who the person was. The plaintiff's clerk was then called, who swore that he believed the plaintiff to have been out of *London* at the time the witness called, and that the plaintiff's brother lived at times in the house and wore

a dressing gown. The clerk also swore that he was not the person who spoke to the witness. The plaintiff had a verdict. A rule having been obtained for a new trial on the ground that the declarations of the person who asked the witness's business at the plaintiff's house, should have been received in evidence for the defendant, or at all events that it should have been left to the jury whether that person was the plaintiff or not,

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W. H. Watson showed cause. All the evidence points to the conclusion that the person in the dressing gown was not the plaintiff. But unless it had been shown affirmatively that he was the plaintiff, or some agent of his duly authorized, what he might have said was not admissible against the plaintiff.

White in support of the rule. There was *prima facie* evidence of identity to go to the jury, and it ought to have been left to them as a matter of fact to say whether the person who appeared was the plaintiff or not. [Lord *Lyndhurst* C. B. According to that argument the judge should have stopped the cause to put a question to the jury as to the identity of the person seen by the witness with the plaintiff, before he decided whether the defendant could give his declarations in evidence or not.]

However, this person acted as principal at the plaintiff's house in answering inquiries, and his declarations and acts are therefore evidence; *Bulkeley v. Butler* (a). In that case the plaintiff's object was to show the indorsement of a bill by *E. S.* the payee to him. For this purpose the plaintiff's clerk was called, and proved that a person calling himself *E. S.* came to

(a) 2 B. & Cr. 434, In error from C. P.

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the plaintiff, having in his possession the bill sued on, and a letter of introduction to the plaintiff, which the witness knew to be genuine, and another bill of exchange drawn by the writer of that letter: That was held *prima facie* evidence for the jury that the person calling himself *E. S.* was the payee of the bill. [*Bayley B.* The possession of the bill by *E. S.* governed that case.] In *Barrett v. Deere* (a) Lord Tenterden held, that payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, was good payment to the merchant, though it turned out that the person paid was never employed by him.

Lord LYNDHURST C. B.—The defence attempted in this case was expected to arise out of some declarations made at the plaintiff's house by an individual who appeared there and answered an inquiry by the witness, and the question is, whether those declarations were admissible in evidence or not? That depends on the point whether the individual making them was the plaintiff or his agent authorized to make such declarations or not; and I am of opinion, that to make them admissible, reasonable evidence should have been given to satisfy, not the jury but the learned judge, that the person making them was the plaintiff; for the judge is to decide on the whole of every matter relating to the rejection or admissibility of evidence. Now the whole evidence of the supposed identity was, that an individual in a dressing gown asked the witness his business, when he called at the plaintiff's house. I am of opinion that that was not sufficient to identify the individual so seen with the plaintiff, so as to make his declarations evidence. Were it necessary for me to go further, I should say that the rest of the proofs contradict the

(a) 2 M. & Malk. C. N. P. 200.

identity desired to be proved. For it appears at least probable that the plaintiff was absent from town at the time, while it was distinctly sworn that the plaintiff's brother occasionally lived there and wore a dressing gown. Neither he nor any other person were called to prove the identity of the person with that plaintiff.

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BAYLEY B.—Whether there was any evidence or not to go to the jury, or whether evidence tendered was admissible or not, was for the judge to decide before he put the case to the jury. He was to form his opinion whether the party whose declarations were offered in evidence was sufficiently proved to be the plaintiff, before he could decide whether they were admissible in evidence or not to affect him. The question of identity was involved in the other question on which the judge had to decide during the progress of the cause, viz., whether the declarations were admissible or not. In *Bulkeley v. Butler* it is clear that the K. B. thought the point whether there is or is not any evidence of the identity of a party to be purely a question for the judge at *nisi prius*, or a *venire de novo* would have been granted. The defendant was bound to establish *proprio Marte*, that the individual who held the conversation proposed to be given in evidence was the plaintiff. Then we must see whether reasonable diligence was used to ascertain whether the person in question was the plaintiff or not; the witness did not know the plaintiff's person, yet neither his clerk nor brother, nor any one domesticated at his house, were called to show that either of them was not the person who spoke with the witness in the passage. Had such evidence been given, it would have been for the jury to consider whether the plaintiff was not that person.

BOLLAND B.—I am of opinion that these declara-
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tions were not admissible in evidence, and that dangerous consequences would follow if they were. Any clerk at the plaintiff's house might have asked the question of the witness, upon which alone it is proposed to assume that it was the plaintiff who asked it. This case has been said to resemble *Barrett v. Deere*, but what was there relied on was the act of the party in receiving the money apparently on behalf of the principal, and it is no part of that decision that his declarations would be evidence to bind the latter. That case turned on the necessity that in commercial transactions payment at a seller's place of business should be sufficient to exonerate a buyer,—whereas in this case the right of fixing the plaintiff arises from his identity, and that only. In *Bulkeley v. Butler* there was strong evidence of identity, whereas here there was no evidence whatever of it.

GURNEY B. concurred.

Rule discharged.

SLACK *against* CHEW, One &c.

The venue will not be changed in an action on a written but unstamped agreement.

A Rule had been obtained to change the venue from *London* to *Lancashire* in an action on a written agreement by the defendant to repay the plaintiff certain money lent, on an affidavit that the agreement declared on was written on unstamped paper, and was so delivered to the plaintiff, and that the cause of action arose in *Lancashire*, and not in *London* or elsewhere. The Court expressing their intention to adhere to the general rule as the safest course, discharged the rule (a).

Wightman for, *J. Jervis* against it.

(a) See *Roberts v. Wright*, ante, Vol I. 532.

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WISDOM *against* Hodson and Another.

TRESPASS. The first count was for assaulting the plaintiff, tearing his clothes, and falsely imprisoning him. The second, for assaulting the plaintiff and tearing his clothes. The third, for assaulting plaintiff and taking from him a hare. The fourth, for a common assault. Pleas:—first, not guilty; second, tender by defendant *Hodson*; third, a like tender by both defendants (both specially pleaded.) Fourth plea, as to the assaulting the plaintiff, seizing and laying hold of him, and a little tearing &c. his clothes, as in the first count mentioned, that before the committing of the same trespasses, or any or either of them, or any part thereof, to wit, on &c., the said plaintiff was found by the defendant *Hodson* upon certain land of and belonging to *W. S.* and in his occupation in the county aforesaid, in search and pursuit of game, without the licence or consent, and against the will of the said

Trespass against two for assaulting plaintiff and tearing his clothes. The fourth plea stated, that before the committing those trespasses, plaintiff was found by defendant on the land of *W. S.* in search of game, without the licence and against the will of *W. S.*, and that plaintiff had in his possession a hare which appeared to have

been recently killed. Whereupon one defendant as servant of, and by command of *W. S.* demanded the hare, which plaintiff refused to deliver, and had in his possession. That afterwards, and just before committing the trespasses, the said defendant demanded the hare from the plaintiff, and because he refused to deliver it, and kept it in his possession, both defendants, as such servants, and by such command, in order to take the same for the use of *W. S.*, seized the plaintiff and took it from him, according to the form of the statute (*viz.* 1 & 2 *Will.* 4. c. 32. s. 36.).

The fifth plea stated, that just before the trespasses, the plaintiff had in his possession a dead hare belonging to *W. S.* without his leave and licence; wherefore defendants did, as his servants, and by his command, demand the same from the plaintiff, which he refused to deliver, and detained; whereupon the defendants, as such servants &c., seized the plaintiff (concluding as in the former plea).

The replication to the fourth plea stated, that at the several times of the demands of the defendant and refusal by the plaintiff, the plaintiff was lawfully on the highway. A similar replication to the demand and refusal in the fifth plea.

On demurrer to the replications it was held, that the fourth plea was bad, for not sufficiently showing when the second demand was made, or that it was made on the land of *W. S.*; and that the fifth plea was also bad, for not stating that the defendants gently laid their hands on the plaintiff in order to take the game, and that because he resisted, they necessarily committed the trespasses complained of, doing as little damage, and using as little violence to the plaintiff as they could on that occasion.

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W. S. (a), and the said plaintiff then and there had in his possession certain game, to wit, a hare, which then and there appeared to have been and had been recently killed. Whereupon the said defendant (*Hodson*) then and there, as the servant and by the command of the said *W. S.*, did, as such servant and by such command, demand from the said plaintiff the said game so in the possession of the said plaintiff as last aforesaid, which the said plaintiff then and there refused to deliver to him the said defendant as such servant as aforesaid, and the said plaintiff then and there kept and had the said game in his possession until and at the time when &c. in the first count mentioned. And the said defendant *Hodson* afterwards, and just before the said time when

(a) As 1 & 2 *W. 4. c. 32. s. 36.* does not enact as a condition precedent to the completing the offence there provided against, that the party must be on the land "without the consent of the owner," it may be doubted whether it is advisable to insert these words. See *Mr. Chitty's observations* on 7 & 8 *G. 4. c. 29. s. 34.* in his edition of *Burn's Justice*, Vol. II. 763; and the answer of the court to *Scarlett's* second objection in *Rex v. Marsh*, 2 *B. & C. 717.* In *Rex v. Rogers*, 2 *Camp. 654*, an indictment on 42 *G. 3. c. 107. s. 1.* for coursing deer in an inclosed ground, the act contained those words, as did also the indictment: and *Lawrence, J.* held it necessary for the prosecutor to call the owner of the deer to prove that he never gave consent to the prisoner to course them; and see *Rex v. Mallinson*, 3 *Burr. 679*; *Rex v. Corden*, 4 *Burr. 2279*, *S. P.*; though in the later case of *Rex v. Allen*, *Ry. & M. C. C. R. 154*, it has been held upon the last-mentioned act, as it had previously been decided on similar words in 5 *G. 3. c. 14.* against taking fish, that it is unnecessary to call the owner, and that his non-consent may be inferred from other circumstances, or proved by his agents, *Rex v. Argent*, *Rex v. Chamberlain*, *ibid.* In *The Apothecaries' Company v. Bentley*, *Ry. & M. 159*, the allegation was in the words of 55 *G. 3. c. 194. s. 20.* that defendant practised as an apothecary, "without having obtained the certificate required by the act;" and the onus of proof was held by Lord *Tenterden* to lie on the defendant. See also *Rex v. Turner*, 5 *M. & S. 206*; *Rex v. Jarvis*, 1 *Burr. 148*, 1 *East, 644*, *n. S. C.*; *Rex v. Stone*, *id. 639*; *Rex v. Wheatman*, 1 *Doag. 345*; *Rex v. Crowther*, 1 *T. R. 125, 127*; and cases collected in 1 *Stark. on Ev. second edit. 362, 363.*

&c., in the said first count mentioned, as the servant and by the command of the said *W. S.*, demanded the said game from the said plaintiff, and because the said plaintiff then and there refused to deliver up the same, and kept and had the same in his possession until and at the said time when &c. in the said first count mentioned, they the said defendants, as such servants, and by such command as aforesaid, at the same time when &c. in the said first count mentioned, in order to seize and take from the said plaintiff the said game so found and being in his possession as aforesaid, for the use of the said *W. S.*, who was then and there entitled to the said game upon the said land, seized and laid hold of the said plaintiff, and did then and there, as such servants, and by such command as aforesaid, seize and take the said game from him for the use of the said *W. S.*, according to the form of the statute in such case made and provided; and in so doing they the said defendants did necessarily and unavoidably a little rend and tear and damage the clothes and wearing apparel of the said plaintiff, as in the said first count mentioned, which are the same supposed trespasses in the introductory part of the said plea mentioned. Verification.

Fifth (and last) plea by both defendants to the same trespasses. That heretofore, and just before the committing of the same trespasses, to wit, on &c. the said plaintiff had in his possession certain game, to wit, a certain dead hare, of and belonging to the said *W. S.* without the leave and licence of the said *W. S.* Wherefore the said defendants, then and there being the servants of the said *W. S.*, did, as such servants as aforesaid, and by the command of the said *W. S.*, just before the said time when &c. in the said first count mentioned, to wit, on the day and year last aforesaid, demand from the said plaintiff the said game so in the

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possession of the said plaintiff as last aforesaid, which the said plaintiff then and there refused to deliver to them the said defendants; and the said plaintiff then and there detained and kept the same in his possession, without the consent and against the will of the said *W. S.*, until and at the said time when &c. in the said first count mentioned; whereupon they the said defendants (as in fourth plea to the end.)

Replications—Similiter to first, and traversing second and third pleas. To fourth plea, that at the several times of making the said demands by the said defendants, and of the refusal of the said plaintiff in the said fourth plea respectively mentioned, and also at the same time when &c. in that plea mentioned, the plaintiff was lawfully in and upon the king's highway, in the peace of our lord the king. Verification.

The replication to the last plea, after protesting that the plaintiff had not in his possession a dead hare of and belonging to the said *W. S.*, in manner and form as in that plea alleged, stated, that at the time of making the demand and refusal in that plea mentioned, and at the said time when &c., he the said plaintiff was lawfully in and upon the king's highway, in the peace of the king. Verification.

Rejoinder of similiter to the second and third pleas, and

Special demurrer to the fourth replication, showing for causes that although the defendants, in and by their fourth plea, have stated and alleged that the plaintiff then and there had the said game in his possession until and at the said time when &c. in the said first count mentioned, which from the context of the said plea amounts to an allegation, that the said plaintiff had the said game at the same time when &c. upon the said land, of and belonging to the said *W. S.* and in his occupation in the said fourth plea mentioned, and

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although the said plaintiff hath by his said replication attempted, in an indirect manner, to traverse and put in issue that fact, by alleging that the said plaintiff was at the said time when &c. in the king's highway, yet the said plaintiff hath concluded his replication with a verification, instead of concluding to the country. Also for that the said plaintiff hath not alleged in his said replication that the said king's highway was not part of the said land of the said *W. S.* in the said fourth plea mentioned, and hath not by his said replication sufficiently traversed or confessed and avoided the said fourth plea; also for that the said replication is informal, and concludes with verification instead of to the country, which tends to prolixity. General demurrer to the last replication. Prayer of imparlance and joinder of demurrer.

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Thesiger for the defendants, and in support of the demurrer. The fourth plea is not answered; for a person found on land with game in his possession cannot escape the demand of it by stepping into a highway.

[Lord *Lyndhurst* C.B. Suppose that he was found on the land with game in his possession, and that a proper demand was there made, it does not appear from the plea that that demand on the land was followed up by any act there at that time. Nothing on the plea sufficiently shows when the second demand was made. It might have been made at a time distinct from that when the plaintiff was found on the land, and, for all that appears, at some other place. The words "then and there" (a) may, as far as the defendant *Hodson* is concerned, apply to the place where he is stated to have acted, but not to that where both defendants are introduced. Consistently with this plea, one defendant

(a) See 14 East, 300; Cro. Jac. 443; Ld. Raym. 576; 13 East, 139; Comyns's Rep. 480.

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might have demanded the hare on the land, and might have gone and demanded it again three days after and at another place. Unless such a state of facts would justify the defendants under this act, the plea is bad. It is probable that the fact may have been, that the defendant *Hodson*, when reinforced on the road by the other defendant, came up and again demanded the hare; but the question here turns on the validity of the plea. If the defendant's act could have been justified by fresh pursuit, and that would be necessary to support the defence, it has not been stated.]

The last plea is good, for the replication admits the hare to be the property of *W. S.* and illegally in the defendant's hands. Then the plaintiff was bound to deliver it on demand by a party deputed by *W. S.* *Rex v. Milton* (a) shows that the owner may retake his goods by force from a person wrongfully refusing to deliver them up.

LORD LYNTHURST C. B.—This plea seeks to excuse a violence to the person; then should it not have stated that the defendants molliter manus imposuerunt, and that because the plaintiff resisted, the defendants necessarily did the acts complained of in the declaration, using no more force than was necessary? At present it does not show that the seizure was necessary. Had excess existed, it might have been newly assigned.

BAYLEY B.—I think the fourth plea bad, for the reasons which have been assigned. I am also of opinion that the fifth plea, in order to justify, should have shown a cause for the wrongful acts charged co-extensive with them. That has not been done, and the plea is therefore bad.

(a) *M. & M.* 107, before Lord *Tenterden*; and see *Hawkins's Pleas of the Crown*, Book I. c. 64. s. 1.; 8 *T. R.* 364, *Rex v. Wilson and Others*.

It was intimated that the special pleas might be withdrawn on payment of costs, as by section 47 of the act the defence might have been given in evidence under the general issue (a).

(a) As it may frequently be desirable to plead specially, in order to narrow the issue to be tried, the above case has been reported. It was argued in *Easter* term. *Bayley* B. also intimated that the pleas should have stated the hare to be wrongfully in the plaintiff's possession, and that the defendants apprised the plaintiff that they demanded it by the authority of the owner or occupier of the land.

MOLYNEUX and Others *against* BROWNE, a Prisoner.

THE defendant being arrested on *27 September 1832*, in an action on a bill of exchange, at suit of the plaintiff on an alias quo minus, returnable on *2d November*, the first day of *Michaelmas* term following, rendered to the Fleet in discharge of his bail in another action on the *3d November*. On *15th December* he filed a petition, pursuant to the insolvent act, *7 Geo. 4. c. 57. s. 10.* to be discharged under that act. He did not file his schedule within fourteen days after filing his petition according to sect. 40, nor give notice to any of his creditors of having filed his petition pursuant to section 42. The plaintiff, however, knew his circumstances, and for that reason did not proceed in this action. A rule having been, therefore, obtained to discharge the plaintiff on entering a common appearance for not having delivered a declaration in due time, valid for the purpose of adjudication intended by sect. 15.

A prisoner who petitioned the insolvent court for his discharge, but did not follow the directions of *7 G. 4. c. 57.* by filing his schedule within 14 days after, or by giving notice to his creditors of having filed his petition, will not, however, be discharged as supersedable for want of a declaration before the end of the second term, for the petition is still

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Erle showed cause. This defendant is not supersedable, for 7 Geo. 4. c. 57. s. 15. in general terms takes away the operation of a supersedeas as to actions for debts, with respect to which an adjudication in the matter of an insolvent's petition can under that act be made. [*Bayley* B. The general rule of the courts on the subject was made before that act passed.] The defendant will rely on his petition having become null on account of his not having filed his schedule in forty days, according to section 40; but as time for doing so may be given by the insolvent court on motion, his petition is valid for the purposes of adjudication and discharge contemplated by sect. 15. till dismissed.

Mansel contra. The general rule of *Mich. 3 Geo. 4.* in this court (*a*) that *after notice given* by prisoners of their intention to apply for their discharge under the insolvent act, no prisoner shall be supersedable or discharged out of custody at suit of such plaintiff from the time of such notice given, only applies where such notice is given. But the petition is null, and no adjudication could take place under it; no schedule having been filed in fourteen days—no extension of time having been granted by the court—nor any notice of filing the petition or schedule having been given to the creditors. He also cited *Garlick v. Ballinger* (*b*).

BAYLEY B.—Subsequently to that case, and to the rule of court cited, the insolvent act, 7 Geo. 4. c. 57. enacted by s. 15, that no prisoner who shall have petitioned the court for relief under that act, shall, after the filing his petition, be discharged out of custody as to any action for or concerning any debt, with respect

(a) 11 Pri. 422; same rule *Easter*, 3 G. 4. in K. B. & C. P. Tidd, 9 ed. 371.

(b) 10 Pri. 123, decided on 3 G. 4. c. 123, passed 6th Aug. 1822.

to which an adjudication in the matter of such petition can, under the provisions of that act, be made by or by virtue of any supersedeas &c. for want of the plaintiff in such action proceeding therein. This case appears to range itself within the words of that section, no part of which renders the previous proceedings inoperative for neglect to file a schedule in fourteen days. Its words are merely directory on that subject, for the insolvent court may extend the time beyond fourteen days. Then the petition being still on the file, and not having been dismissed, is still valid for the purpose of adjudication. The filing that petition showed he meant to avail himself of the relief afforded by the act.

Rule discharged without costs.

WARDLE *against* ACKLAND.

THE notice of trial was for the first sittings in *Trinity* term, viz. *Monday 3 June*. On daily search at the marshal's office, it appeared no such cause was set down before *Saturday*, the first of *June*. On the evening of that day, however, the defendant's attorney received a notice of continuance of trial for the second sittings in the term, viz. being the 5th *June*, with a summons to amend, which last was abandoned on *Monday, 3d June*. On the 5th the cause was tried as an undefended cause, and the plaintiff had a verdict for 170*l*. A rule for a new trial was obtained, on the ground of the insufficiency or irregularity of the notice of continuance of notice of trial, it not having been served two days, one inclusive the other exclusive, before the day fixed for the trial by the original no-

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Two days
notice of con-
tinuance of
trial to ano-
ther sittings
must be given,
exclusive of a
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tice (a). Cause was shown that *Sunday* the 2d day not being provided for by *Reg. Gen. Hil. 2 W. 4. No. VIII. (ante Vol. II. 352)* as a dies non, except it fall on the last day prescribed by the practice, that day and the sitting day, *Monday* the 3d, were two sufficient days for the notice of continuance of trial. *Barnes, 305*, was cited. But

Per Curiam.—Notice of continuance of trial from one sittings to another cannot be given, unless it be given two days before that on which according to the original notice the trial is to be had. Now *Sunday* was no day for this purpose, and *Monday* was that for which the notice of trial had been given. The notice of continuance, therefore, was bad, and the rule must be absolute with costs as moved.

Curwood for, *Dunbar* against the rule (b).

(a) This was stated to be the practice of the office; and that the notice of continuance should have been served on *Friday*, as the notice of trial was for *Monday*; and see *Tidd*, 9th ed. 757, 758. If, however, the time be two "clear" days, see *Grojean v. Manning*, Vol. II. 725, then the last day falling on *Sunday*, the two days must be reckoned exclusive of that day also. See *Hil. 1832*, Rule VIII. *ante* 352.

(b) See *Grojean v. Manning*, Vol. II. 725, S. P. Correct that page thus, —In last line of first paragraph, and in line 2 from bottom, instead of "30 May," insert "30 April," and add to second line of marginal note "continuance of."

PRYER *against* SMITH.

Declaration
 and rule to
 plead of *Easter*
 term. Judg-
 ment was
 signed in *Tri-*
nity term, and
 held good without fresh rule to plead of that term.

DEFENDANT was a prisoner. The declaration was of *Easter* term. It did not appear that there was not a rule to plead of that term, or in the last vacation. Interlocutory judgment was signed in this term

held good without fresh rule to plead of that term.

without a rule to plead of this term. It was moved by *Busby* to set aside the judgment as irregular on that ground.

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BAYLEY B.—A rule to plead may now be given in vacation, which for this purpose destroys the distinction of term and vacation. Then non constat there is any irregularity. If the plaintiff was bound to give a rule to plead as of this term, it would give a defendant four more days time to plead, which was not intended. Rules to plead are mere form. Here the declaration being of last term, the defendant was bound to plead in vacation. Probably time to plead was given, and if so, no rule to plead was required at all. *Mould v. Murphy* (a) is in point.

Rule refused on that ground ; granted
on the merits.

(a) *Ante*, 538.

BALLMONT *against* MORRIS.

CAUSE was shown against a rule for setting aside proceedings on a bail bond on payment of costs, that the bail bond ought, at all events, to stand as a security, for the plaintiff might have tried his cause, if bail had been properly put in ; and that though he had not declared, he was not bound to declare *de bene esse*.

A bail bond will not be ordered to stand as a security on setting aside proceedings against bail, unless the plaintiff has declared *de bene esse*.
(See *Reg. Gen. Hil. 2 W. 4. No. V. Vol. II. 351.*)

BAYLEY B.—The rule is, that if you do not in fact avail yourself of your liberty to declare *de bene esse*, you cannot complain that you have lost a trial for want of special bail being perfected in due time (a). Sir W. *Owen* against, *R. V. Richards* for the rule.

(a) See *Bevan v. Knight*, Vol. I. 420.

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HEWITT *against* MELTON.

A *distringas* will be granted for the purpose of enabling a plaintiff to proceed to outlawry in some cases, when the affidavits are not sufficient to ground a *distringas* to compel the defendant to enter an appearance.

ON 22d May, *Platt* moved for a *distringas*, under 2 Will. 4. c. 39. s. 3., to compel the defendant to enter an appearance, on affidavits insufficient for that purpose, the calls having been made, not at the gaol, where the defendant was with his son, but at his original residence. The affidavits disclosed facts showing it nearly impossible to serve the defendant even while in gaol, and that he had since been discharged, and was not to be found.

LORD LYNTHURST C. B. (after consulting the other Barons.)—Our opinion is, that on this affidavit the plaintiff is entitled to a *distringas*, for the purpose of enabling him to proceed to outlawry, though not in order to enter an appearance.

Writ granted accordingly (a).

(a) See *Fraser v. Case*, 9 Bing. 464.

PHILLIPS *against* BOWEN.

PRICE *against* SAME.

GODSON moved for a *distringas*, in order to enable the plaintiff to proceed to outlawry. Three calls were duly made at the residence of the defendant in order to serve him with process. The answers of the servant always were, "not at home," and "not known when he will return." A copy was left at the last call. The affidavit stated information in the neighbourhood, that defendant kept out of the way to avoid service, as also that deponent believed he did, and that it would be impossible to serve him. No appearance had been entered.

On 4 June, GURNEY B. granted the writ as prayed.

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PENNELL *against* THOMPSON.

HUTCHINSON obtained a rule for an extent under section 3 of 11 G. 4. and 1 W. 4. c. 73. against the defendant and his sureties on the recognizance and bond given by them, pursuant to 60 G. 3. c. 9. The action was against the editor of the *Satirist* paper for a libel, and the plaintiff obtained a verdict for 100*l.* damages. Execution for 193*l.* damages and costs was issued and delivered to the sheriff. The affidavits stated that the sheriff had returned nulla bona, and that neither defendant or his sureties could be found, and that no satisfaction could be obtained for the damages and costs. It was afterwards ordered, that service of the rule at the last known residences of the defendant and his sureties, viz. those mentioned in the recognizances, and at the office of the *Satirist* paper, be good service.

A plaintiff who recovers damages against the editor of a newspaper for a libel, cannot have an extent against him and his sureties on their recognizances or bonds, pursuant to 60 G. 3. c. 9. and 11 G. 4. and 1 W. 4. c. 73. s. 3. without satisfying the court by facts detailed in affidavit that the plaintiff has not been able to procure satisfaction by writ of execution against the defendant's goods.

Erle showed for cause that the plaintiff was bound by 11 G. 4. and 1 W. 4. c. 73. s. 3. to show the court that he had used due diligence to get satisfaction from the goods of the principal, and that what appeared on the affidavits was insufficient.

Hutchinson supported the rule.

LORD LYNTHURST C. B. — The plaintiff only shows the issuing a writ of fi. fa. and a return of nulla bona. The rest of the affidavit is loose and general. Nor is the court satisfied by any thing else alleged in it, that due diligence has been used to get satisfaction from the defendant's goods.

Rule discharged.

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WILKINS *against* WRIGHT, Esq.

The defendant and another magistrate, on making an order of filiation against the plaintiff, signed and sealed two papers, supposed by them to be duplicate originals of the order, and delivered one to the putative father, the other to the parish officer. The duplicate delivered to the overseer contained an order on the putative father to pay a weekly sum to the parish officers, while that delivered to him, the father, ordered the mother only to pay a weekly sum. On his refusing to pay arrears on that ground, a copy of the

TRESPASS for assault and false imprisonment.

Plea, the general issue. The plaintiff had been apprehended for non-performance of an order of filiation made by the defendant and another magistrate. At the trial before *Vaughan* B., at the last assizes for *Norfolk*, it appeared, that when the plaintiff was taken, in the first instance, before the magistrates, an order of filiation was made by them in duplicate, both papers being signed and sealed by both magistrates, as had been their usual practice. One of them was delivered to the parish officer in attendance, and the other to the plaintiff. The copy delivered to the plaintiff was in the usual form, as far as adjudging him to be the father of the child. It then ordered him to pay to the parish officers 15s. for and towards the lying-in and maintenance of the child to the time of making the order, and also 1*l.* 16s. 6*d.* for the making the order and other incidental expenses. It then proceeded to order that *Sarah Aldis* (the mother) should likewise pay to the parish officers the sum of 1s. 6*d.* weekly, for and towards the maintenance of the said bastard child, for so long as the said bastard child shall be chargeable to the said parish of &c. And it further ordered, that the said *Sarah Aldis* should also pay to the said order in the overseer's possession was delivered to him. Held, that he was liable to imprisonment for non-payment of arrears accruing subsequent to that delivery; for the order left with the overseer was the true order, and the mistake in the supposed duplicate of it delivered to the plaintiff by way of notice, was cured as to those arrears by the delivery of the correct copy.

A warrant of commitment, pursuant to 49 G. 3. c. 88. s. 3. for not paying money under an order in bastardy, must state a complaint made by a parish officer that the sum directed by the order to be paid had not been so paid, that the sum due had been demanded, and that the magistrate adjudicated on the complaint so made.

Seemle, it should also show that the order of filiation was unappealed against, or that it was appealed against and confirmed, and that the defendant was called on to show cause for not paying the sums stated in the order.

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parish officers the sum of 1s. weekly, so long as the said bastard child shall be chargeable to the said parish of &c., in case she shall not nurse and take care of the said bastard child herself. The plaintiff paid the two first-mentioned sums as directed, but after the time for appealing against the order had expired, the weekly sum of 1s. 6d. became in arrear, and he refused to pay the amount, on the ground that the mother was ordered to pay that sum. On 13th *Feb.* 1830, a paper, purporting to be a copy of an order of affiliation made on the plaintiff, and differing from the original given to him, in the insertion of the words "a copy of" at the top, and in the substitution of the plaintiff's name "*William Wilkins*," in lieu of "*Sarah Aldis*," in the direction for payment of the 1s. 6d. a week for maintenance, was delivered to the plaintiff. The duplicate order of affiliation given to the parish officer was sworn by the clerk to the magistrates to have been in the latter form, and the parish officer of *New Buckenham* produced an order couched in those terms as the order received by him from the clerk on the first-mentioned occasion. On the 18th of *May* 1832, further arrears to the amount of 15s. having accrued, the plaintiff was taken to prison on the following warrant of commitment of the same date, and signed by the defendant. After reciting the making of the order of bastardy and adjudication thereon, that the plaintiff was the reputed father of the child, it proceeded, "And whereas it hath appeared unto me, that the said *W. W.* hath had notice of the said order, and *E. E.*, one of the overseers of the poor of &c., hath made oath before me that the said *W. W.* hath not observed and performed the said order, but that there is now due and owing on account of the said order, to the 16th *May* instant, the sum of 15s., the same having been demanded of him the said *W. W.*, and that he has

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refused to pay the same." Then followed the commitment of plaintiff to the House of Correction to hard labour for three months, unless the 15s. was sooner paid, or the plaintiff should be otherwise discharged in due course of law. The plaintiff was in prison till 23d May, when he was liberated on paying the 15s.

Upon these facts the learned baron was of opinion that the order delivered to the parish officers was that which should be acted on, and inclined to nonsuit the plaintiff, but to save expense directed the jury to assess the damages, which they did at 5*l*. The plaintiff was then nonsuited, with leave to move to enter a verdict for that sum, if this court should be of opinion that the action was maintainable. In *Easter term Kelly* obtained a rule, according to the leave reserved, on two grounds.

First, That there was no valid order of filiation, for disobedience to which the defendant could commit the plaintiff to gaol.

Secondly, That the commitment was illegal, for not reciting that proof on oath had been given before the defendant of the original order, or of the other matters requisite to confer jurisdiction on the magistrates to commit, pursuant to 49 *Geo. 3. c. 88*. *Bayley B.* observing that the magistrates made what at the time they conceived to be duplicate originals, and that the order on the mother to pay 1*s. 6d.* a-week while the child was chargeable, and 1*s.* a-week only if she did not nurse it, was clearly a mistake.

B. Andrews showed cause in this term. The case depends on 18 *Eliz. c. 3. s. 2.*, and 49 *Geo. 3. c. 88. s. 3*. The 18 *Eliz.* so far from requiring that original orders of filiation should be served on the party charged by the magistrates, merely prescribes that they shall give him notice of the order. All that the defendant could inquire into before making the commit-

ment, under 49 *Geo. 3.*, would be, whether there had been a complaint by the parish officers, notice to the party of an order of filiation to pay money, a demand of that money from the reputed father, and a refusal by him to pay.

The order received from the magistrates by the parish officer and produced by him, was correct, and had never been set aside. He was entitled to the custody of it, for if the reputed father had it, he might, by refusing to produce it, render it difficult to proceed against the mother. A correct notice of the order was given to the father on the 13th *February*. That was all he was entitled to by 18 *Elix. (a)*, and cured the incorrectness of what has been called the duplicate original delivered to him in the first instance. The plaintiff might have appealed to the sessions next after 1st *February*; *Rex v. Justices of Kent (b)*, *Rex v. Thackwell (c)*. But taking the order delivered to the plaintiff to be incorrect, the defendant might have made another on the 18th *February*, as it appears from many cases that a magistrate is not precluded by the delivery of an erroneous conviction from setting up a correct one. Thus where the copy of a conviction delivered by the magistrates' clerk contained a mistake in the informer's name, it was held, that a conviction with the name of the real informer might be returned to sessions, *Rex v. Allen (d)*: so where a mistake occurred in a commitment operating as a conviction, *Massey v. Johnson (e)*.

The objection to the commitment is, that it does not state upon oath, according to 49 *G. 3.*, that the order of filiation was made. But it states that an order had been made, and that proof was given on oath, that the sum

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(a) See the form of information, 1 Burn's Justice, by Chitty, 390.

(b) 8 B. & Cr. 639.

(c) 4 B. & Cr. 62.

(d) 15 East, 335.

(e) 12 East, 67.

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thereby ordered to be paid, treating the order as valid, had been demanded, and that payment had not been made. Taking then what is there recited to be true, the magistrate not only had power to commit, but was required by 49 *Geo. 3.* to do so, and shows that he had such power. But if he had jurisdiction, it might be shown by parol evidence, without setting it out on the face of the commitment (a). In 2 *Hawkins*, ch. 16. s. 17. it is said, that in treason it is safe to set forth the party to be charged on oath, but it is not necessary. It must be kept in mind that a good and valid order existed, and that if the plaintiff was originally misled by the supposed copy, the magistrates cured the mistake by sending the correct one.

Kelly and Gunning contra. The fallacy lies in assuming that the order which the parish officers gave in evidence for the defendant was the original order which the magistrates made and intended to make. But, in fact, two complete and perfect orders were made, differing in terms. It is unnecessary to consider whether or not a magistrate may rectify a mistake by completing and perfecting a proceeding, for no fact here appears, proving any animus to correct the mistake. Is the order kept by the parish officer of itself complete, entitling the magistrate to make out a warrant of commitment? Both are duplicate originals, constituting either two orders, or together forming one. First, did the two form one order? If they did, the whole must be void; for if an instrument consists of two parts deriving its obligation from its contents, and one differs from the other, the whole is repugnant. A contract by a broker should be made by his entering it in his book and signing it according to the custom; but where he neglected to sign such an entry, and the contract con-

(a) 1 *Burn's Justice*, 760, *Chitty's edit.*

sisted of two parts, one delivered to the vendor and the other to the purchaser, and differing in a material particular, it was held that no valid contract existed; *Grant v. Fletcher* (a).

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[*Bayley B.* There it was essential to have two bought and sold notes; for as there was no entry in the book signed by the broker, the two notes made but one contract.]

There was no more necessity there than in this case that two papers should be made out; and if the magistrates, instead of making duplicate orders, had made in their book a complete order, and had kept it there, that would have been good.

Secondly, Taking these instruments as distinct, it cannot be denied that either, if made alone or made separately, would have been binding. Now as the magistrates had jurisdiction to make the order that the mother should pay the weekly maintenance, *Rex v. Taylor* (b), *Rex v. Willy* (c), the defendant might have committed either her or the plaintiff to gaol for non-compliance with the directions respectively applicable to them. The woman had power to appeal, and by that means only could the order be got rid of. The magistrates did not make two orders at the same time, one on the father, the other on the mother, for it was admitted that they only intended to make one order on both.

It is assumed that the order produced by the parish officer was the original binding one, viz. that which was made first; but there is no evidence which was that original order, which, when completed, the magistrates could not replace by another. Parol evidence cannot be admitted to avoid a written order legal on

(a) 5 B. & Cr. 436.

(b) 3 Burr. 1679.

(c) 1 Bott. 490.

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the face of it. It was for the defendant to show that when the magistrates made the order which he produced, they had power to make it, and that it was the first they made, or non constat that that delivered to the plaintiff was that which they made before they were functi officio. If so, its legal effect would not be determined by the delivery of it to any person's custody.

Secondly, The warrant of commitment is bad at common law for not distinctly showing that the magistrate had power to commit, by stating that there was proof before him on oath of the original order. Consistently with this order the original may have been produced without oath that it was the correct order. *Rex v. Childers* (a) and *Regina v. Weston* (b) show that nothing will be inferred to give the justices jurisdiction. The indemnities given in some cases to officers of justice by 24 Geo. 2. c. 44. show that it was necessary to protect them from the consequences of acting under a commitment invalid on the face of it.

BAYLEY B.—The first point creates no difficulty in my mind. Looking at the stat. 18 Eliz. c. 19. as intended for the relief of the parish, and the punishment of the putative father, the order is to be directed to neither parent, but to the overseers of the parish which is to be relieved. The latter persons are the natural depositaries of the order, as they are to see it enforced against the putative father, who might otherwise take measures to prevent its being used against himself. My brothers agree with me, that notwithstanding the delivery of the incorrect order to the putative father, as notice to him of the terms of the effective order, the correct one delivered to the parish officer is to be looked on as containing the true matter, and as

(a) 1 Barnard. 326.

(b) 1 Salk. 122; 1 Ld. Raym. 1197.

the original and binding one. The two orders do not constitute two instruments equally binding; but that in the hands of the parish officer is the true order made, with which the plaintiff was bound to comply. As that was right, the mistake in the notice delivered to the putative father was cured by delivering him a copy of the correct order on 13th *February*; from which time he would be bound to look on that as the true order, and might be imprisoned for not obeying it. This case does not resemble that of *Grant v. Fletcher*, for there, by the broker's signature in his book, there might be one entire contract; but if there was not, a bought and sold note was requisite, to show the contract; and if two corresponding notes cannot be had, no entire contract is made out. Upon the second point, as at present advised, I think the warrant was a commitment not for future trial, but in execution. It should therefore, I think, show on the face of it, that the magistrate possessed the jurisdiction he takes on him to exercise. That depends on the words of the act 49 *Geo. 3.*, which does not confine the jurisdiction of magistrates to the county where the original order was made.

By direction of the court cause was again shown on the second point, and re-argued in *Michaelmas* term by

B. Andrews for the defendant. *Ex parte Addis* (a) shows that as the original order of filiation was not appealed against at the next sessions, the magistrate was bound to proceed under 49 *Geo. 3. c. 68. s. 3.*, by commitment for three months in case of non-payment. It was not necessary to recite the title of that statute in the warrant of commitment, though in execution, *Rex v. Harpur* (b); or to state the offence with the same

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(a) 7 B. & Cr. 87.

(b) 1 D. & R. 222.

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precision as in a conviction; but enough should appear to show an authority to imprison, per *Best, C.J. Wickes v. Clutterbuck* (a). In *Rex v. Rogers* (b) a warrant of commitment in execution recited that the party had been convicted in a penalty, but omitted to state how it was to be distributed and to whom to be paid; the court held it good notwithstanding, saying they were bound to presume that there was a good conviction before commitment, and that there was no distinction which authorized them to look at the warrant of commitment with the same strictness as a conviction. So here the court will presume a proper order to have preceded the warrant of commitment. Nor need it appear on the face of the warrant that the money was not paid, or no cause shown, *Rex v. York and Another* (c). He also cited *Rex v. Helps* (d).

Kelly contra. The warrant of commitment shows no jurisdiction in the magistrate empowering him to order plaintiff to be apprehended. Besides, under the statute 49 Geo. 3. three things were requisite before the issuing it: first, an order of filiation verified on oath; secondly, proof that the money was due and unpaid; thirdly, a demand thereof and refusal to pay, without good cause shown for such refusal. [*Bailey* B. If the plaintiff does not put the order in issue before the magistrates, should it not be taken for granted?] If so, it is bad as a warrant of commitment, for it was imperative on the magistrate to state therein that no cause was shown by the plaintiff against the payment, and that he had failed to comply with the order. The magistrate may disbelieve the oath, and therefore should find the guilt of the party, *Rex v. Rhodes* (e), *Rex v. Cooper* (f). But it does not ap-

(a) 2 Bing. 491, 2. See 5 Burr. 2686.

(b) 1 D. & R. 158.

(c) 5 Burr. 2684.

(d) 3 M. & S. 331.

(e) 4 T. R. 220.

(f) 6 T. R. 509.

pear distinctly that the commitment was made on proof "on oath" of the order as required by 49 Geo. 3. Could intendment of the oath be admitted to supply this requisite in a conviction, *Ex parte Aldridge* (a) would have been otherwise decided. *Rex v. Cordell* (b) is also in point. He also cited Dr. *Groenvelt's* case (c) and *Wickes v. Clutterbuck* (d). The facts should have been so stated that the court may see that the commitment took place agreeably to justice, whereas it is quite consistent with the defendant having shown a sufficient answer to the charge. The forms in *Burn's Justice* are departed from.

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BAYLEY B.—The question left undecided in this case turned on the validity of the warrant of commitment granted against the plaintiff for not obeying an order of bastardy, which directed him to be committed for three months, unless in the meantime he paid a sum of 15s. It was therefore, in substance, not a warrant of commitment merely, but a conviction of the party; so that it was necessary to show on the face of it that the magistrate had jurisdiction on the subject, that he did convict the party, and that he had grounds for that conviction. The stat. 49 Geo. 3. c. 68. s. 3. provides, that as far as any order of bastardy to be made by two justices is concerned, it shall be made on the complaint of one of the overseers of the parish where the child has been, or is likely to become chargeable; and that if the party refuses to pay the money, another complaint shall be made to a justice of the order having been made, and of the refusal of the party to obey it, and that then it should be competent to such justice to issue his warrant that the party should be brought before

(a) 2 B. & Cr. 600.

(b) 4 Burr. 2081.

(c) Ld. Raym. 213.

(d) 2 Bing. 491.

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him or some other justice of peace, to answer the matter of the said complaint. That is the purpose for which the party is to be brought before the second magistrate; then if the party does not pay the money, or show sufficient cause for not so doing, he may be committed, as was here done. The object of bringing the party before the magistrates is, that he may answer the complaint. He ought therefore to be apprised of its nature, and that it is made by one of the overseers, and ought to be put on his defence to it.

I think also that there should be an adjudication by the magistrate upon that complaint. In this case the warrant of commitment stated, that whereas *W. Wilkins* was this day brought before me, *J. Wright*, for not having performed the requisition of an order of bastardy made under the hands and seals of two justices for the said county upon the 8th of *November 1825*, for the maintenance of a male bastard child. Now in this form it does not appear that this order of the two justices had been confirmed at sessions, or had remained unappealed from. Nor does it appear on whose complaint to the justices it was made, whether by the overseer or not; nor that it was an order on the party, as far as I have hitherto read; and it does not appear what this complaint was, further than that of a general allegation of not obeying an order of justices. It then goes on thus:—"And whereas it appears to me that the said *W. Wilkins* has had notice of the said order, and one of the overseers has made oath that the said sums have been demanded, and that he has refused payment of the same; these are therefore to require you to take the said *W. Wilkins* to the house of correction, there to remain for the space of three months, until the sum of 15s. has been paid and discharged by him, or he is discharged by due course of law." Now, the language of this

commitment does not state, from first to last, that he was called on to answer the charge; nor does it show any adjudication on the part of the magistrate convicting him of the offence, nor of the matter which was the subject of the complaint, nor any adjudication of non-payment, or that sufficient cause was not shown to the contrary, but that on proof of the non-payment, of demand, and refusal, the magistrate committed him. Now, as it seems to me, it was the duty of the magistrate to set forth in the commitment what the party was called on to answer, as well as the nature of the original complaint; and that after hearing evidence in support of the complaint, he should have given the party an opportunity of answering it; and should have adjudicated upon that answer, if any was given. On these grounds, viz. that the warrant did not set forth any complaint, and does not imply that the party was called on to answer such complaint, or show that he was asked whether he had any sufficient cause to show against the complaint, but chiefly because the complaint of the overseer is not set out, I am of opinion that the warrant of commitment is bad, and that the verdict ought, therefore, to be entered for the plaintiff.

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VAUGHAN B.—As I view the questions which have been argued upon the rule granted for setting aside the nonsuit and entering a verdict for the plaintiff in a different light from my learned brothers, (although ultimately arriving at the same conclusion,) I will state the grounds of my opinion. I do not hesitate to avow that I have struggled hard to support this commitment, anxious to prevent justice from being entangled in a net of form, and to extend that protection to magistrates to which they are entitled, when acting from the purest motives in the zealous discharge of their public

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duty. At the same time I am alive to the necessity of watching with jealousy the execution of the powers confided to them in these summary convictions, which it must be conceded are derogatory to the liberty of the subject: and all powers given in restraint of liberty must be strictly pursued (a).

This was an action of trespass and false imprisonment brought against the defendant, a magistrate of the county of *Norfolk*, who pleaded the general issue and gave his justification in evidence. The cause was tried before me at *Norwich* at the last spring assizes, when I directed a nonsuit, giving the plaintiff liberty to move to set it aside, and enter a verdict for 5*l.*, being the amount of the damages assessed by a special jury, in case the court should be of opinion that the action could be maintained.

The plaintiff insisted that he had been unlawfully committed to prison by the defendant for disobeying an order of filiation made upon him by two justices; that the order delivered to him, and which he produced upon the trial, was defective and void, the operative part of it being by mistake made upon the mother, "*Sarah Aldis*," who was ordered to pay &c., instead of the plaintiff, who was adjudged to be the putative father. On the part of the defendant it appeared, that when the child was filiated two orders were made, one delivered to the overseer, and the other to the putative father: that the one delivered to the overseer was perfectly correct, but that in the other, delivered to the plaintiff, the name of the mother was inserted by mistake. A correct copy of the order was afterwards, and before the warrant granted for his apprehension, delivered to the plaintiff, and the money due upon it regularly demanded, which the plaintiff refused to pay.

This was the only objection relied upon at nisi prius,

(a) Per Cur. *Bracy's case*, 1 Salk. 349.

and I overruled it; being of opinion that as the order delivered to the overseer was admitted to be correct, *that* was sufficient.

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Before the cause was concluded another objection was taken, viz. that it did not appear upon the face of the commitment that the order of filiation was *verified on oath* before the *committing* magistrate; and this question I reserved also, without hearing any argument upon it.

The information, order, and warrant of commitment, were all in evidence upon the trial. It was further proved on the part of the defendant, that the plaintiff was called upon, when brought before him, to show why he did not pay the money which had been demanded of him; to which he answered, "it was a bad order, and he should not pay;" upon which he was told that he must be committed to prison; whereupon the warrant of commitment was made out, upon the validity of which the question arises.

The objection founded on the invalidity of the original order of filiation being *that* on which the defendant mainly relied at nisi prius, and having been disposed of in favour of the defendant when last brought under the consideration of the court, the only question now remaining is upon the legality of the *warrant of commitment*.

In considering the legality of this commitment, it should be remembered that this is a commitment *in execution*, and commitments in execution are construed more strictly than commitments for safe custody; *Rex v. Gourlay* (a). It is of a *criminal* nature, and was so held in *The King v. Archer* (b) and *The King v. Bowen* (c), where the mutiny act having exempted a soldier in actual service from arrest for other than some criminal matter, was held not to extend to a commitment for disobeying an order of bastardy, which was

(a) 7 B. & C. 672.

(b) 2 T. R. 274.

(c) 5 T. R. 158.

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construed altogether as a criminal process. Besides, this commitment is in effect a conviction, and operates as such. Indeed it is the only conviction necessary, and is therefore subject to the rules by which the validity of convictions are tried. Let us therefore examine it by these tests.

First, it is essential to the legality of a conviction that the jurisdiction of the magistrate should appear upon the face of it.

Secondly, the offence must be sufficiently described.

Thirdly, the defendant must be called upon for his defence: and,

Lastly, it must appear that he was adjudged guilty, and upon such adjudication was committed for punishment, pursuant to the terms of the act of parliament upon which the conviction proceeded.

It is not necessary that the conviction should be drawn in any precise form, but the matters must appear with reasonable certainty. Do they so appear upon the face of this commitment?

The answer to these questions depends upon the true construction of the stat. 49 *Geo. 3. c. 68. s. 3.*

First, as to the jurisdiction of the magistrate. It was objected on the trial, and has since been argued before us, that in order to give the magistrate jurisdiction, it must appear on the commitment that the original order of filiation was verified on oath before the committing magistrate: but I do not so read the statute. We must be careful to distinguish between the duty required of the justice granting the warrant to apprehend the putative father, and the duty required of the justice granting the warrant to commit him. These several duties may be performed by different justices. The statute does not require the order of filiation to be verified on oath before the committing magistrate. It directs *any* justice, on complaint of the overseer, and upon proof on oath of the order for payment &c., to

issue his warrant to *apprehend* the reputed father, and to bring him before such justice, or *any other* justice, to answer such complaint; and if he shall not pay such sum as shall appear to the said justice, before whom he shall be brought, to be due and unpaid, or shall not show to such justice some reasonable and sufficient cause for not so doing, it shall be lawful to commit him &c. for three months' imprisonment. It is clear, therefore, that the statute does not require the verification on oath of the original order before the magistrate who is to commit, and it may be (as the fact was in this case) that the committing magistrate was one of the justices making the original order, and might take judicial cognizance of his own hand and seal. This objection therefore, in my humble judgment, fails.

But other objections have been taken in the course of the argument, which were neither insisted upon at *nisi prius*, nor even mentioned when the rule was obtained. And it has been insisted that, consistently with the terms of this commitment, the demand and refusal to pay the money alleged to be due upon the order might have been made at some by-gone and antecedent period when the defendant was not present, the language of the order of commitment being, "whereas it *has* appeared," &c. &c., in the *past* tense. I grant it was formerly required that a conviction should state all the judicial proceedings in the *present* tense; *Rex v. Roberts* (a); but more modern decisions have relaxed that rule; *Rex v. Hall* (b). We are to look at the plain import of the words, without drawing any strained inferences; the rule being as recognized by Lord *Ellenborough*, in *Rex v. Hazell* (c), that the court will intend nothing in favour of convictions, and nothing against them. In *The King v. Chandler* (d), which was a con-

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(a) 1 Str. 638. Lord Raym. 736.

(b) 1 T. R. 320.

(c) 13 East, 141.

(d) Lord Raym. 581.

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viction for deer stealing, Lord *Holt* C.J. thus expresses himself:—"In these convictions by justices in a summary way, where the ancient course of proceeding by indictment and trial by jury is dispensed with, the court may more easily dispense with forms; and it is sufficient for the justices, in the description of the offence, to pursue the words of the statute; and they are not confined to the legal forms requisite in indictments for offences by the common law. All that is necessary in these cases of new offences, made by new statutes and in new summary methods of conviction by them, is to show such a fact as is within the description of the statute, and to describe it as the statute wills." Mr. Justice *Buller* recognizes the same doctrine in *Rex v. Green* (a), wherein he observes, "The court, in considering convictions, is always strict in two or three points. 1st, That a jurisdiction is shown by the convicting magistrate: 2dly, That the party has been summoned: and, 3dly, That the case has been duly made out in evidence. But the court has not been strict in the technical words of them, and I know of no case which says that summary convictions shall be drawn in any precise form." (b)

Upon referring to the language of the warrant of commitment, I confess it seems to me that the jurisdiction of the magistrate and the offence itself are described with reasonable and sufficient certainty. The words "And whereas *H. Ely* hath made oath that there is now due and owing &c. (see p. 825), which *W. W.* hath refused to pay," in the ordinary and grammatical construction of them, import an immediate and present, and not an antecedent or by-gone demand of the arrears claimed to be due upon the order.

But admitting the jurisdiction of the magistrate to be apparent, and the offence to be sufficiently described,

(a) *Cald.* 391,(b) *Paley on Convictions*, 46, 2d edit.

I am at a loss to discover upon the face of the commitment, (or I would rather call it the conviction,) that the defendant was ever called upon for his defence, or, in other words, to show any reasonable or sufficient cause for the non-payment of the sum demanded. I consider this step as preliminary, and necessarily preliminary, to the adjudication of his guilt. The commitment being in fact a conviction, ought to contain a succinct narrative of the judicial proceedings, and non constat that the defendant was ever called upon for his defence. *Boscawen*, in his *Treatise upon Convictions*, observes, in p. 62, "If the defendant appears, he should be asked what he has to say in his defence, and that defence, (if he has any,) or his confession, must be stated in the conviction." I therefore think the warrant of commitment is defective in not stating these particulars; and the defendant having omitted to draw up and return to the justices of assize a formal conviction, which I conceive he might have done, and which, if done, would have protected him; and there being no other conviction than the warrant of commitment, I feel myself reluctantly constrained, for the reasons I have stated, to pronounce it erroneous. I consider it as a case of peculiar hardship upon the defendant, because it is admitted that his motive cannot be impeached: and the law, in case of magistrates, has provided, that if there be a good conviction it will be a defence. And if this commitment had been quashed upon a return to a habeas corpus, no action of trespass could have been maintained, but an action on the case only, wherein it must have been proved that the magistrate acted maliciously and without probable cause, or the plaintiff could recover only twopence, and would be entitled to no costs (a). In the course of the argument it was insisted that this commitment is not drawn in conformity with

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(a) 43 Geo. 3. c. 149.

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the usual printed forms. It is remarkable, that although the statute upon which this conviction proceeds passed in the 49 *Geo. 3.*, and a new edition of *Burn's Justice* was published about six years afterwards, in 1815, no notice is taken in that edition of the legislative provisions of this act, then so recently passed, and the old forms of conviction were reprinted. In the editions of 1820 and 1825, by Sir *George Chetwynd*, in the still later edition by Mr. *Marriott*, and in the recent one of Mr. *Chitty* in 1832, the forms were remodelled, and an averment introduced negating the fact of any reasonable or sufficient cause being shown for the non-payment of the money, pursuant to the order.

I have not thought it necessary to comment upon the cases cited in the argument of *Wilkes v. Clatterbuck* (a), and *Rogers v. Jones* (b), because no jurisdiction whatever appeared on the face of those commitments.

I repeat my regret that I find myself bound to concur with my brothers in opinion, for the reasons I have stated, that the rule must be made absolute.

BAYLEY B. also added, that the case could not be brought within the 3 *Geo. 4. c. 23.* as it could not be stated that the party appeared and pleaded.

BOLLAND B.—I concur with all that has fallen from my brother *Bayley*. It must appear on the face of a conviction, or commitment in execution, that every thing has been done which is required by the common or statute law, unless the statute gives a summary form of conviction. With regard to which, I confess I regret that in many cases the legislature has frittered away the protection which the subject would otherwise enjoy, by giving to a summary conviction all the force

(a) 10 B. Moore, 63.

(b) *Ryan & Moody*, 129; 3 Barn. & Cr. 409.

of a judgment. The statute requires that the party be called, and that the magistrate, before whom the party is called, sustain inquiries. He must first be satisfied that the order is an order of two magistrates; that the order has been confirmed at the court of sessions, where such an order becomes, in substance, conclusive, or that no appeal has been made against the order. Now it appears to me that, in this case, the order was confirmed in place, that for the purpose of setting up this order, it should have appeared to be confirmed in the court of quarter sessions, or unappealed from. With respect to this, it is perfectly consistent with any fact in the case, that the order had been appealed from and not confirmed. The next requisite of the statute is, that the appeal be made on the complaint of one of the parties to the parish charged with the support of the child. That fact does not appear in this case. It goes at once to the fact that the money had been paid, and that it had been demanded. The fact that it had been demanded appears on the face of this order, but only by way of recital, which recital is not binding on what has taken place before other magistrates. It is stated that the man was brought into the court before the justice, but not whether any thing was done before him, or what answer he gave. For aught that appears he might have gone away immediately. It does not appear that he was called on to make any defence. The case might have taken place after the magistrate had proceeded wholly on what appeared and was satisfied by the other magistrate. There is wanting in this case the main ingredient, namely, that the magistrate decided the case called upon the defendant to give what answer he had to make to the demand. If the defendant had been so called on he might have shown that he had a good and sufficient reason for

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the money. I am of opinion that, under these circumstances, judgment must be entered for the plaintiff.

GURNEY B.—I fully concur with the rest of the Court. It was necessary that this commitment should show that the party charged was called on for his defence, and should state what appeared to him to be due. It does not state this, nor why the money was not paid, nor whether the sum was reasonable, nor whether there was any sufficient reason why it should not be paid.

Judgment for the plaintiff.

BROOKS *against* BLANSHARD.

Plaintiff had superintended the works of a railway company as engineer, but was discontinued by them. The situation of

civil engineer to another undertaking having subsequently become vacant, the plaintiff became a candidate. The defendant having written to A., (*Laing*) introducing *Bush* as a candidate, A., after the event of the election was known, wrote to the defendant, telling him that C. had been elected. The defendant then wrote a letter to A. stating matter in disparagement of the plaintiff while engineer to the railway. Defendant and A. were both shareholders in the railway, and defendant managed A.'s affairs relative to it. That letter having been shown, occasioned the loss of the plaintiff's election on a subsequent vacancy in the office of civil engineer to the other undertaking: Held, that as the letter containing the libel was written by the defendant after the first election was ended, and before the second was contemplated, without his having been called on to give an opinion about the plaintiff, it was not a privileged communication.

If a count on a libel state an imputation on the plaintiff of "*mismanagement or ignorance*," and the proof is "*ignorance or inattention*," it is a fatal variance.

Where a declaration stated the defendant to have published a libel concerning the plaintiff in the form of a letter containing "*the false &c. matter following*," and owing to the letter having been burnt, secondary evidence of its contents was given by means of the oral testimony of two witnesses, each of whose statements differed from that made by the other, and also from that laid in the record: Held, that as no matter in print or writing was produced in evidence, the judge at *nisi prius* had, under 9 Geo. 4. c. 15., no power to amend the declaration.

Quære, whether amendment could have been made by a copy produced in such case as secondary evidence. See now 3 & 4 Will. 4. c. 42, s. 23.

appointed to superintend a certain railway, called the *Clarence* railway, for and on the behalf of the company of proprietors of the said railway, and as such had superintended the said railway with great skill, diligence, and integrity, during the whole time that the plaintiff had such superintendence; and before, and at the time of the composing and publishing of the said false, scandalous, malicious, and defamatory libel therein-after mentioned, there had been and still were certain commissioners, called the commissioners for the improvement of the river *Wear*, and the port and haven of *Sunderland*, &c.; and that the said commissioners, before &c. the composing and publishing of the said false &c. libel, by public advertisements and otherwise, called for and required a person, for great gain and profit, to act as civil engineer to the said commissioners, in their said improvement of the river *Wear* &c.: that the plaintiff, before and at the time of the composing and publishing the said false &c. libel thereafter mentioned, was and still is a fit, proper, and competent person to perform the duties of civil engineer to the said commissioners, for the purposes aforesaid: that before and at the time of the composing and publishing the false &c. libel thereafter mentioned, the plaintiff applied to the said commissioners to be elected and appointed to the said office of civil engineer, and thereupon the plaintiff received several promises from several of the said commissioners, and particularly from one *W. Featherstonhaugh*, one of the said commissioners, of support and assistance for and towards the election and appointment of the plaintiff to the said office of civil engineer; yet the defendant, well knowing the premises, but contriving &c. to injure the plaintiff in his credit and reputation, and also in his said profession and business of civil engineer as aforesaid, and to cause it to be sus-

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pected and believed by the said commissioners that the plaintiff had conducted himself dishonestly, injudiciously, ignorantly, unskilfully, and improperly, as a civil engineer, in his (the plaintiff's) superintendence as such of the *Clarence* railway aforesaid, and to cause it to be suspected and believed by the said commissioners that the plaintiff was incompetent and unfit to perform the duties of civil engineer to the said commissioners &c., and that the plaintiff was not a proper person to be elected and appointed such civil engineer as aforesaid, and to cause and induce the said commissioners to refuse to elect and appoint the plaintiff such civil engineer as aforesaid, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, heretofore, to wit, on &c., at &c., wrongfully, maliciously, and injuriously composed, wrote, and published, and caused to be composed, written, and published, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff, in the way of and in respect to his said profession and business of civil engineer to the said *Clarence* railway, in the form of, and as a letter addressed to Mr. *Philip Laing*, which said Mr. *Philip Laing* then was, and is one of the said commissioners; in which said letter was and is contained, amongst other things, the false &c. matter following; that is to say, Mr. *Brooks* (meaning the plaintiff), whilst he had the superintendence of the *Clarence* railway, meaning the superintendence of the said railway called the *Clarence* railway, as civil engineer as aforesaid,) has, by his mismanagement or ignorance, cost that company (meaning the said company of proprietors of the said *Clarence* railway) a considerable sum of money.

The third count stated the libel thus:—"Mr. *Brooks's* blunders have cost the *Clarence* railway several thousand pounds," (meaning that the ignorance

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and mismanagement of the plaintiff had cost the said company of proprietors several thousand pounds.)

The fifth count was, "Mr. *Brooks*, by his *mismanagement* or *ignorance*, cost the *Clarence* railway several thousand pounds." The breach alleged, as special damage, that one *W. Featherstonhaugh* did not support and assist the plaintiff in his endeavours to become elected and appointed civil engineer to the said commissioners; but opposed, and used his best endeavours to oppose his election; and that the commissioners refused to elect him.

Plea, general issue. At the last assizes for *Durham*, before *Gurney B.*, the following facts were proved. The plaintiff had superintended the works of the *Clarence* railway, but after some time that body discontinued his services, and reinstated their former inspector. The defendant and Mr. *Laing* were both holders of shares in the *Clarence* railway, the defendant being manager of *Laing's* affairs in that concern. *Laing* was also one of the commissioners for improving the navigation of the *Wear* and the port of *Sunderland*.

The employment of civil engineer of the *Wear* commissioners having become vacant, the plaintiff became a candidate; the defendant, by letter to *Laing*, introduced one *Bush* to him as a candidate, but was ignorant at that time that *Laing* was personally a *Wear* commissioner. One *Leslie* was elected, and his election was announced to the defendant by a letter from *Laing*, on 25th *March*, to which, on the next day, the defendant wrote an answer, thanking *Laing* for voting for *Bush*, and adding the libellous matter declared on. Very shortly afterwards *Leslie* resigned, and at a subsequent election the plaintiff was again rejected by a majority of thirty-one to twenty-nine. One *Featherstonhaugh* deposed that he should have voted for the

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plaintiff on that occasion, if he had not seen the defendant's letter to *Laing*. The defendant's letter having been burnt, *Laing* was called to prove its contents, and said that it was on the subject of the mismanagement of the *Clarence* railway; and that the defendant added, that the plaintiff had got employed by them for a time, and from ignorance or inattention had cost the company a large sum of money; that he (defendant) believed he (plaintiff) had been brought up a drawing-master, but that he did not seem to know much of engineering. *Featherstonhaugh* also proved that the defendant's letter asserted the plaintiff to have been employed by the *Clarence* railway company, and that from "inability, or want of skill," he had done that on the railway at the cost of a large sum, which it had afterwards cost them several thousands to undo.

Upon this evidence it was contended, for the defendant, that this was a privileged communication; first, because the defendant and *Laing* were both shareholders in the *Clarence* railway, and the letter was written *bonâ fide* respecting its management. Secondly, because it concerned the character of a former servant as well of the party writing the letter, as of his correspondent, therefore that no express malice being proved, the plaintiff must be nonsuited. It was also contended that the imputation of "mismanagement or ignorance" in the declaration, materially varied from the libel charging the defendant with *inattention* or ignorance, inability or want of skill.

The learned baron did not stop the cause, but gave leave to move to enter a nonsuit, and also reserved for the opinion of the court the question whether the variance, if it was one, could be amended, by his order, under 9 *Geo. 4. c. 15.*, directing that, if it should be held that it could, it should be considered as made.

The jury found a verdict for the plaintiff, damages 1*s.*, being of opinion that the defendant acted without malice.

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In *Easter* term *R. Alexander* moved accordingly. First, this is a privileged communication, and not only was no proof of malice given by the plaintiff, but the jury have expressly denied its existence. The letter was confidential from an agent to his employer on the agency concerns. [Lord *Lyndhurst* C. B. It is not merely because a communication is confidential that it is privileged, if it is volunteered by the party making it (a). The defendant was not called on to give any opinion on the result of the first election; it was over. *Bayley* B. The letter was written after the first election, and before the second was in contemplation. The plaintiff's concern with the *Clarence* railway had ceased before either election.]

In *M'Dougall v. Claridge* (b) it was held, that a letter written confidentially to persons who employed the plaintiff as their solicitor, conveying charges injurious to his professional character in managing concerns trusted to him by them, and in which the writer was interested, was not actionable; and *Cleaver v. Sarraude* (c) was cited by Lord *Ellenborough* to the same effect (d). *Dunman v. Bigg* (e) shows, that a party having the security of a surety for the payment of money to him, may *bonâ fide* state to that surety matter affecting the character of his principal without being liable to an action. In *Cleaver v. Sarraude*, the communication held privileged was volunteered. [Lord *Lyndhurst* C. B. *M'Dougall v. Claridge* does

(a) And see per *Littledale* J. in *Pattison v. Jones*, 8 B. & C. 585. And per Cur. in *Jones v. Affleck*, 9 B. & C. 403.

(b) 1 Camp. 267.

(c) Id. p. 268.

(d) See *Fairman v. Ives*, 5 B. & Ald. 642.

(e) 1 Camp. 269, n.

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not support your argument, for the defendant was there directly interested in the matter in which the party charged was acting and misconducting himself. That was therefore a case of privileged communication.]

This letter was also a privileged communication, because it concerned the character of a former servant. The gist of an action for defamation in giving the character of a servant "must be malice, which is not implied from the occasion of speaking, but should be directly proved;" per Lord Mansfield in *Edmonson v. Stevenson* (a), which has been followed by *Rogers v. Clifton* (b), *Weatherstone v. Hawkins* (c), *Bromage v. Prosser* (d), *Child v. Affleck* (e), *Ward v. Smith* (f). In *Rogers v. Clifton*, Rooks J. declared his opinion, that a master might at any time, whether asked or not, speak of the character of his servant, provided he speak in the honesty of his heart. In *Pattison v. Jones* (g), Bayley J. lays down a similar doctrine at length. [Bayley B. The question there was, whether the original master was acting bonâ fide under a belief that he was discharging a duty which he owed to the party about to take the plaintiff into his service, or whether he acted maliciously; and the jury found malice.] Lord Lyndhurst C. B. That action was rested at the trial on the second letter, which was in answer to general questions respecting the plaintiff's character put by the party whose service the plaintiff proposed to enter.] In *Jones v. Affleck*, the disparaging statements concerned acts done after the service with the defendant had ended, and were volunteered to persons who had recommended the plaintiff to her, but not

(a) Bull. N. P. 8.

(b) 3 Bos. & P. 587.

(c) 1 T. R. 110.

(d) 4 B. & Cr. 247.

(e) 9 B. & Cr. 403.

(f) 4 Carr. & P. 305.

(g) 8 B. & Cr. 584.

being proved by the plaintiff to be false, were held privileged.

Secondly, the variance between the declaration and libel is material, for the ideas conveyed by the words of each are different (a). The counts proved charge an imputation of "*mismanagement* or ignorance," while the evidence is of "*inattention* or ignorance." [Lord *Lyndhurst*. The one does not exclude the other.] They differ as commission and omission do.

LORD LYNTHURST C. B.—There is nothing in the authorities cited on the first point to show that this was a privileged communication, or that there was any duty calling on the defendant to make it. Take a rule on the point of variance.

Cresswell showed cause in this term. First, there was no variance. Mismanagement may proceed from either ignorance or carelessness, *i. e.* inattention. Then, as it is here specifically alleged to be something different from ignorance, it must be referred to inattention; therefore the allegation of mismanagement or ignorance, is supported by the proof of ignorance or inattention. Intentional mismanagement would be malfeasance; whereas mismanagement, in the popular sense, means neglecting or not knowing how to manage. Misconduct would have been charged had the defendant intended to impute wilful wrong. *The Queen v. Grate* (b) shows that where the pleading does not assume to set out a libel according to its tenor, but only to describe it as a writing containing such and such words, nice exactness is not required in the proof, "because it is only a description of the sense and substance of the libel." The jury were not called

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(a) 2 Phil. on Ev. 6th ed. 147, 151.

(b) 3 Salk. 294.

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on to say whether, taking the whole evidence of the contents of the letter together, the word "mismanagement" was or was not there used in the same sense as in the declaration. There should therefore, be a new trial. [*Bayley* B. The question is of variance, and for the court.]

Secondly, if this was a variance, the judge had power to amend at nisi prius, under 9 *Geo.* 4. c. 15., though the letter containing the libel having been burnt, could not be produced at the trial, and secondary evidence was therefore admitted of its contents. To hold otherwise, would be to frustrate the intention of the act in the cases where a variance in the proof is more likely to take place than on producing a written instrument. For it has been held under this act, that a judge may amend from a copy of the matter "in print or writing" set forth on the record. In *Briant v. Eicke* (a) the count alleged a judgment of the court of *King's Bench*, whereas the examined copy produced in evidence purported to have been given by the court of *Common Pleas*; and Lord *Tenterden*, after argument, allowed the amendment, "though the matter in writing produced in evidence," viz., the examined copy, was not "recited or set forth" on the record, but on the contrary, the original judgment. That case therefore went beyond the strict wording of 9 *Geo.* 4. c. 15., in order to give effect to its intention. Now a thing is not "produced in evidence," till it is proved; then, if the thing set out on the record must itself be produced in order to amend, a copy could not have been admitted in evidence. But if it could, then as there are no degrees in secondary evidence (b), the oral evidence of witnesses is as good proof of the thing here set out on the record whereby to amend that allegation, as a copy

(a) *M. & Malk.* 359.(b) *Brown v. Woodman*, 6 C. & P. 206.

would have been. [*Bayley B. In Briant v. Eicke* Lord *Tenterden* seemed to think the examined copy to be a "matter in writing produced in evidence," within 9 *Geo. 4. c. 15.*] The "recital or setting forth thereof on the record" applies to the original, not to the copy. A copy is *evidence* of the thing set forth on the record, but is not that thing; yet the amendment of the record was permitted to take place by it. By the words "produced in evidence," the legislature meant "proved," for producing a writing amounts to nothing without proving it also. So that in *Briant v. Eicke* "the matter in writing produced in evidence" was not that which was "recited or set forth upon the records," but a copy only. Now the evidence proposed to be admitted in this case, for the purpose of amendment, is also secondary evidence, though by parol.

Alexander and *W. H. Watson* in support of the rule. Inattention is not synonymous with mismanagement, as has been contended. *Johnson* defines "mismanagement," as ill management, ill conduct; "inattention," as disregard, negligence, and neglect. One is of commission, the other of omission; the one of misfeasance, the other of nonfeasance. A counsel absent from the trial of a prisoner whom he is retained to defend, would be said to be guilty of inattention; whereas, if by indiscreet questions he endangers his client, he would be charged with mismanagement. So, if a physician absents himself from his patient, he is inattentive; but if he kills him by improper treatment, he may be said to have done so from mismanagement. Over zeal, want of judgment, and many other causes, dehors inattention, may constitute mismanagement. The case of *The Queen v. Grate* does not apply, for though the libel is not stated according to its tenor, it is stated as "the false &c. matter following," and it

the declaration assumed to set out. Besides, it was the primary evidence of the record which could not be removed, and was the best proof of the judgment, the record itself not being in issue (a). Then *Briant v. Eicke* is no authority to show that a copy, as mere secondary evidence in writing has been admitted under this act in order to amend by much less than oral testimony, could be so admitted. In *Whitehead v. Scott* (b), Lord *Tenterden* said, "Laxity in allowing amendments, has, in my opinion, done more harm than good." *Cooke v. Smith* (c), is an instance of the strictness with which, before 9 Geo. 4. c. 15., material variances in actions for libel were viewed by the courts.

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BAYLEY B.—It seems to me that this rule ought to be made absolute. The first question is, whether there is a variance or not. The record states, that the defendant imputed to the plaintiff the loss by his employers of a considerable sum of money by his mismanagement or ignorance. The libel is proved by one of the witnesses to have charged the plaintiff with the same result, from his ignorance or inattention. I agree with the plaintiff's counsel, that if mismanagement and inattention are necessarily identical, so that one does not mean more than the other, the proof of imputed inattention would prove the allegation of mismanagement. But I think that they are not identical, and that mismanagement goes higher than mere inattention, including many cases which exceed and would not be included in it. The libel, as proved, did not confine the mismanagement it imputed to mismanagement by inattention. Now it might be mismanagement by design, and a distinction must exist between such cases and those of inattention only. The

(a) 1 Phil. on Ev. 6th ed. 366. (b) 3 M. & M. 136. A. D. 1831.
 (c) Mac Lelland R. 230.

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evidence of the other witness may be considered as imputing wilful mismanagement, but on the short ground that a charge of mismanagement goes further than a charge of inattention, and embraces cases which the latter does not, I am of opinion that this declaration was not supported by the evidence.

The question then arises, whether this variance was amendable under 9 *Geo.* 4. c. 15. I admit that there is more probability of a variance where the medium of proof is confined to the mere recollection of witnesses, than where it is clothed in the form of written evidence, whether an original or a copy; and that therefore a power of amendment may be more needed in the former case. But the question here is, whether the legislature meant to remedy cases of that description, by empowering a judge to amend, not from a written instrument, which gives him an unequivocal opportunity of knowing what the original was, but by the oral testimony of witnesses, who may, and in this instance actually did, give different versions of the contents of the original libel. That prudence which was so peculiarly the characteristic of the late Lord *Tenterden's* judgment, may be clearly traced in this act of the legislature, which limits the power of amendment to the cases having matter in print or writing to amend by. For where, as in this case, one witness gives one version of a written instrument, and a second another, by which of them can the amendment take place? The correctness of neither can be established, whilst to call other witnesses might give rise to fresh discrepancies. Let us examine whether the words of 9 *Geo.* 4. c. 15. apply, where an amendment is proposed to be made from the oral testimony of witnesses as to the contents of a written instrument, and not from any written evidence of it visibly produced. The mischief recited in the preamble as that intended to be remedied, is the expense incurred

and delay or failure of justice which takes place at trials "by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case." The preamble then clearly contemplates the producing a writing in evidence. The enacting part follows: "when any variance shall appear between any matter *in writing or in print* produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending &c., the judge may amend." In what cases then can he amend? In the case only where the variance is between some matter in writing or in print produced in evidence, and its recital &c. on the record. In *Briant v. Eicke*, Lord *Tenterden* admitted an amendment to be made by an examined copy of the record of a judgment, because he considered that copy, when produced in evidence, to be identical with the original declared on. He said, "The examined copy of the former judgment is a matter in writing so produced, and the statute therefore authorizes the amendment." In that case there was a matter in writing following the tenor of the original record; whereas here, all which is proposed to amend by, is the recollection of witnesses, at best fallible and fleeting, and in this case, differing besides. I am of opinion, therefore, that this case is not within the act, but that its true meaning is, that a writing must be produced in evidence by which to amend the record. The present rule for a nonsuit should therefore be made absolute. B1

VAUGHAN B.—The act has been framed with particular accuracy, in order to permit amendments in particular cases only. Throughout its enacting part, as well as the preamble, it uses the words "writing produced in evidence," so as to confine the judges

is proposed to amend a record by secondary evidence in writing, is within the act or not.

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Rule absolute for entering a nonsuit (a).

(a) See *Parke v. Edge*, ante, 364; and 3 & 4 Will. 4. c. 42. s. 23.

In the Matter of the Effects of *Pigott*, deceased.

AMOS, on the part of the crown, had obtained a rule (or order) under 42 Geo. 3. c. 99. s. 2., calling on *J. Hixon*, surviving executor of *Jane Munby* deceased, who when living was sole executrix of *Joseph Munby* deceased, who when living was sole executor of *Pigott* deceased, to show cause why he should not deliver an account on oath of the legacies or personal property paid or to be paid or administered by him, and why he should not pay the duties due to the crown, on any such legacies, shares, or residue, given and bequeathed by the will of the said *J. Pigott*. That rule was enlarged by another rule, till the king's remembrancer, on reference to him made, had taken an account of the duties so due and payable from *Hixon*, as such executor, for or in respect of the said legacies or residue.

The testator, *Pigott*, died in 1812, having made his will, bequeathing to his executor, *Joseph Munby*, 3000*l.*, and the residue after paying other legacies. That will was proved by the executor, the effects being sworn under 15,000*l.*, and the crown now sought to recover legacy duty on that legacy and residue.

Joseph Munby, the first executor, died in March 1816, leaving his widow *Jane* his sole executrix and legatee of his whole personalty; she proved his will, to make the rule absolute, according to the discretion vested in them by the above act to do so, if it had appeared to them to be proper and necessary for better enforcing payment of legacy duty.

The surviving executor of an executrix of an executor of *P.*, the original testator, who died in 1812, was called on in 1833, under 42 Geo. 3. c. 99. s. 2., to show cause why he should not account for legacy duty due from the estate of *P.* The surviving executor swore that he had never had in his hands assets of *P.*, the original testator, or of his own testatrix, and that he knew nothing of her estate, never having acted as her executor, except in proving her will and signing necessary papers. The court refused

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and swore the effects to be under 6000*l.*, and died in *August* 1819, leaving a will with four executors, one of whom was named *Pearson*, and another *Hixon*, against whom the rule had been obtained. All four proved her will, and swore the effects under 3000*l.*; two died before *Pearson*, who also died in *December* 1831, leaving *Hixon* the sole survivor. *Hixon* swore that *Pearson* alone administered the effects of *Jane Munby* till very near his own death, and that he, *Hixon*, had only acted in signing necessary papers; that he had no knowledge of the property of the said *Jane Munby*, or whether she or *Joseph Munby* ever got any property from *Pigott*, and that no assets of *Jane Munby* or *Pigott* had ever come to his hands. It did not appear whether legacy duty had been paid on the 3000*l.*, or on the residue bequeathed to *Joseph Munby*, but his son, an attorney, who was only eight years old at his father's death in 1813, and represented none of the parties, had after his father's death, viz. in 1818, and afterwards, as late as *January* 1833, paid sums in respect of duty due on other legacies bequeathed by *Pigott*; but swore that he never could discover from his parents' books what estate either of them ever got from *Pigott* (a).

*W. H. Watson* showed cause. First, the surviving executor *Hixon* had no assets of *Pigott*'s. He is not driven to contend that an executor of an executor is not within 36 *Geq.* 3. c. 52., for the crown has not shown that he is an executor who ever had in his hands any assets of *Pigott*, as was absolutely requisite for them to do in order to support the claim of duty. On the other hand, he swears that he never had assets

(a) Considerable litigation had taken place as to *Pigott*'s property; see *Attorney General v. Joseph Munby*, (the executor of *Pigott*) 1 *Merriv.* 327, at the *Rolls*, November 1816.

either of the original testator *Pigott*, or of his own immediate testatrix *Jane Munby*. Then to charge him with legacy duty in respect of bequests made by *Pigott*, would be to violate the well-known principle of equity, that an executor is only liable for such assets as he actually receives into his own hands. The crown proceeds upon sections 6 and 35 of 36 *Geo. 3. c. 52.*, for duty on a legacy and residue which *Joseph Munby* the first executor was entitled to retain. That duty became a debt due to the king, and the 42 *Geo. 3. c. 99. s. 2.*, empowered this court to grant a rule requiring him to show cause why he should not deliver an account on oath of all the legacies or personalty respectively paid or to be paid or administered by him, and why those duties have not been paid or should not be forthwith paid. But no legacy was paid or to be paid on any personalty to be administered by him, or was he even "entitled" to retain any of *Pigott's* assets in respect of any legacy or residue bequeathed by him to *Joseph Munby*.

The legacy duty claimed would be a debt due to the crown from *Joseph* or *Jane Munby*, when either became so entitled to retain the legacy or residue; then non-payment of it by either would be only a *devastavit*, for which *Jane* if alive, or *Hixon* as her executor, might be liable under 30 *Car. 2. c. 7.*, and 4 & 5 *W. & M. c. 24. s. 12.*, but then only *de bonis testatoris*. 1 *Saund.* 219 *e. and f. n. (8).* [*Bayley B.* assented.] So that unless reasonable ground is shown to believe that *Hixon* had assets of *Pigott*, through *Joseph* or *Jane Munby*, the case for the crown will not be aided by any conjecture that *Jane Munby's* executors must have possessed themselves of those assets, because she was sole executrix of *Joseph Munby*, whose estate bequeathed to her was sworn under 6,000*l.*, and her own under 3,000*l.*

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estate of *Jane Munby*. He is called on in the character of legal representative of *Pigott*, in respect of assets which were originally the property of *Pigott*; but *he* has made no payments of legacy duty; they have been made down to a very late date by a person acting as executor *de son tort*, nor does it appear that they were made out of money had by him from *Hixon* acting in execution of *Jane Munby's* will.] The payments of legacy duty made by the cestui que trust could only have been made by him in respect of his liability (a), as having been taken by *Hixon* and his co-executors and trustees. *Hixon* is identified with *Joseph Munby* the first executor, and is liable, as ultimate executor, under the legacy duty acts.

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BAYLEY B.—We are here called upon to compel an executor to account in the exercise of the discretion reserved to us by 42 Geo. 3. c. 99. s. 2.; but, under the circumstances of this case, I am of opinion that we ought not so to exercise it. For we ought not to send the executor to account at a great expense, unless we see a reasonable probability, that in the result of the inquiry he might be found liable to pay the duty suggested to be due from him. The enactment is, that in every case in which executors &c. shall not have paid &c., within proper and reasonable time, it shall be lawful for this court to grant a rule requiring them to show cause why they should not deliver to the commissioners an account on oath of all the legacies &c., paid or administered “by him, her, or them,” and to make it absolute in every case in which the same shall appear to the court to be proper and necessary for the better enforcing payment of any of the said duties. Now the words “proper and reasonable time,” only apply to the executors not having paid the duties

(a) See last sentence of 36 Geo. 3. c. 52. s. 6.

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within such time, and do not limit the time for making this application to the court. But notwithstanding we ought so to exercise our discretion, as to require it to be made within a reasonable time, or to have the delay accounted for by affidavits, where a long period has elapsed, it is here sought to compel one *Hiron* to account for legacy duty and residue, under the will of *Pigott* who died in 1812, having made *Joseph Munby* his executor. *Munby* died in 1816, leaving his widow, *Jane Munby*, his executrix and sole legatee; she died in 1819, leaving four executors, of whom *Hiron* has survived. He swears that he never acted except in signing necessary papers, and it appears that one of his co-executors, who died in *December* 1831, had always managed *Jane Munby's* estate alone, till shortly before his death. He also swears, that he never had any assets of *Pigott's*, and has no knowledge of *Jane Munby's* estate. We cannot tell that *Joseph Munby* did not in his lifetime receive all *Pigott's* assets, and it is probable that he did. Under all these circumstances, it would be an unreasonable exercise of our discretion to compel *Hiron* to account at a considerable expense. The rule must therefore be discharged.

VAUGHAN B.—The affidavits disclose facts which afford a sufficient answer to the application, and show that it would make the act an instrument of much oppression if we made this rule absolute.

BOLLAND and GURNEY Bs. concurred.

Rule discharged.

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VALLANCE *against* EVANS.

**TRESPASS**, for prostrating a board. One plea, pleaded to the whole declaration, justified the trespass, on the ground that the board was a nuisance to the public highway. The replication traversed the nuisance, and new assigned the excess. Judgment by default on the new assignment. The issue on the nuisance went to trial with other issues raised on two other pleas; the defendant succeeded on the first; the jury were discharged as to the other issues, and the master afterwards refused to allow the defendant any costs of the pleadings or witnesses applicable to them.

Where the defendant obtained a verdict on a plea going to the whole declaration, and the jury was discharged from finding a verdict on two other pleas:—Held, that the defendant was not entitled to receive costs on them.

*Hill* for the defendant, moved to review the taxation, citing *Cross v. Johnson (a)*, and *Thornton v. Williamson (b)*.

But, *per Curiam*.—The defendant obtained the general costs of the trial as well as those of the issues found for him. But he is not entitled to the costs of the issues, on which there was no finding either way, and which, if the jury had not been discharged, might have been found against him, so as to subject him to costs. Those costs were not costs in the cause; they are not the costs of the pleadings only, but costs which those pleadings occasion, *viz.* of witnesses brought to support issues which were not tried; then they are not given on either side.

(a) 9 B. &amp; Cr. 613, 616.

(b) 13 East, 191.

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error existed, or by the plaintiff since it has been spent, till the defendant finding himself free from it issued this execution.] The record must have been certified or a rule to certify it should have expired before a scire facias quare executionem non could be taken out; *Goodright v. Hugoson* (a). But the infant was not liable for costs of a nonsuit, *Grace v. Grace* (b), and the *prochein amy* ought to have been taken in execution. [Bayley B. In the case cited the infant brought trespass by guardian, which prevented inference of malice against him, *Turner v. Turner* (c).] An infant cannot be called on to give security for costs (d).

BAYLEY B.—*Gardiner v. Holt*, though arising on a verdict, is exactly analogous. But it was for the plaintiff to proceed with his writ of error; in order to which he might have compelled the defendant to bring in the roll before the return day, the 23d April, on which day he might have transcribed the record, and might then have assigned his errors.

Rule discharged.

(a) Cas. t. Hardw. 331.

(b) Cro. El. 33; see 1 Bulst. 309.

(c) 1 P. Wms. 296; 1 Stra. 708. S. C.

(d) 2 Chit. R. 339.

### LEWIS *against* PYNE.

A RULE was obtained for setting aside proceedings on a scire facias against bail after return of scire feci, for irregularity, the bail not being summoned by the sheriff till after eight o'clock on the evening before the return day. Cause was shown that they may be summoned at any time before the rising of the court on the return day, *Clarke v. Bradshaw* (e). In

It is not too late to summons bail on the evening before the return day of the scire facias against them, in order to fix them by returning scire feci.

(e) 1 East, 86.

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support of the rule it was said, that the opportunity of rendering intended to be given to the bail by summoning them in due time, would be lost, if they may be summoned so late as to be necessarily fixed before they can render. *Reg. Gen. Hil. T. 2 W. 4. No. 81 (a)*, was intended to secure fair notice to the bail of proceedings against them. Where bail were only summoned an hour before the court rose on the return day of the sci. fa., the proceedings were set aside, *Webb v. Harvey (b)*.

LORD LYNTHURST C. B.—It appears from Lord Kenyon's judgment in *Clarke v. Bradshaw* that the service of the summons on the bail in *Webb v. Harvey* took place after the court had risen. It is, therefore, no authority to show the proceedings irregular.

VAUGHAN B.—This scire facias has laid in the office for more than the four exclusive days before the return, which by *Obrian v. Frasier (c)*, is all the period required. In *Clarke v. Bradshaw* the summons took place on the evening before the return day, as in this case, and it was held sufficient to fix the bail. But the judgment in that case, after examining *Webb v. Harvey* and *Pool v. Wills (d)*, shows that a summons before the rising of the court on the return day would be sufficient. *Tidd*, 9th ed. 1123, 1124, is the same way.

*Per Curiam*.—Rule discharged without costs. *Carrington* for, *Hutchinson* against the rule.

(a) *Ante*, Vol. II. 348.

(b) 2 T. R. 757.

(c) *Stra.* 644.

(d) 2 T. R. 758 n.

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HORTON *against* The Inhabitants of STAMFORD.

**T**HE plaintiff sued the defendants by the name of the inhabitants of the "*hundred*" of *Stamford*, under 7 & 8 G. 4. c. 31. s. 2., for a felonious injury to his property by persons riotously and tumultuously assembled together. *Stamford* is a borough lying in the counties of *Lincoln* and *Northampton*, and is not a hundred. On this being discovered, the three calendar months having expired, within which, by section three, the action must be commenced,

A writ and other proceedings against the inhabitants of the "*hundred of S.*" were amended by inserting "*borough*" instead, where the time for commencing a fresh action against them for felonious injury to property by rioters under 7 & 8 G. 4. c. 3. had expired.

*Kelly* obtained a rule to amend the writ and subsequent proceedings, by substituting the word "*borough*" for "*hundred*" throughout.

*J. Hildyard* showed cause. The court has not power to amend the writ. Till the uniformity of process act, 2 W. 4. c. 37., the defendants could have only been sued by original, which writ the courts would not have amended. [*Bayley* B. But *Carr v. Shaw and another* (a), shows the court would, at common law, have amended the special capias on the original by inserting the right christian name, though there was nothing to amend by, and the master of the rolls would have supplied an original, corresponding with and supporting such an amended capias.] The misnomer might there have been pleaded in abatement, whereas in this case there is no such hundred as that of *Stamford*, and the objection is in bar as a matter of substance; and as *Stamford* is a borough lying in two counties, and is therefore not within the purview of 7 & 8 G. 4. c. 31. s. 2. or s. 12., a nonsuit must have ensued. [*Bayley* B. In order to prevent that

(a) 7 T. R. 299.

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nonsuit, and to try the question of the liability of the inhabitants of a place so situated, this amendment is sought to prevent loss of all opportunity to try the question.] No such body of men exists as are here sued.

*Kelly* contrâ. In *Baker v. Neave* (a), the action was brought by two assignees of a bankrupt, and the writ was amended by adding the name of the official assignee.

BAYLEY B.—It appears to me, that we ought to permit this amendment. The action is, in substance, brought against the inhabitants of *Stamford*, whom the plaintiff conceives to be bound by 7 & 8 G. 4. c. 31. to reimburse him for damages sustained. He has called *Stamford* a hundred, whereas it turns out to be a borough. He has attempted to sue the right defendants, but has erred in the description of the district where they reside. It would be a gross injustice to suffer him to be concluded from trying this question, by such a slip. Even in penal actions amendments have been permitted on the ground that the parties would otherwise be too late to commence a fresh action (b).

VAUGHAN B.—The act, though penal in some respects, is also highly remedial in others. Then the amendment prayed will let in the justice of the case, in order to try the question.

BOLLAND and GURNEY Bs. concurring, the rule was made absolute on payment of costs, and the defendants having a fortnight's time to plead.

(a) *Ante*, 233.(b) *Tidd*, 9 ed. 711.

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MACALPINE, Administratrix, *against* POWLES and  
Another.

**A**SSUMPSIT for breach of a contract to allot land to plaintiff in *Columbia*. *R. V. Richards* moved to review a taxation, by which the expenses of two witnesses coming hither from *Barbadoes* and returning there were allowed. Since 1 *Will. 4. c. 22.* a rule might have been obtained for examining them in that *British* colony on interrogatories, which would have prevented these expenses.

Expenses of bringing over witnesses from abroad, of subsisting them here, and of their return, may be allowed, at the discretion of the master, subject to the review of the court, as well since 1 *W. 4. c. 22.*, as before.

LORD LYNTHURST C. B.—The statute 1 *Will. 4. c. 22.*, meant to confer on the courts of law a power to sue forth writs in the nature of a mandamus or commission for taking interrogatories, which they did not before possess, by extending the operation of 13 *Geo. 3. c. 63. s. 64.*, from *British India* to all other *British* colonies. But though proofs merely formal may be well obtained by that means, it may prove very difficult to elicit facts on interrogatories which might be obtained by *vivâ voce* examination. The reading of written evidence produces but a slight impression. Again, a witness, if present, might be able to explain a difficulty unexpectedly arising in the progress of the cause, or to refute a misrepresentation. My present impression is, that it is in the discretion of the master to allow or disallow costs of this kind in each particular case, subject to the review of this court, and that 1 *Will. 4. c. 22.* has made no difference in that respect. A rule having been granted,

*Erle* shewed for cause that 1 *Will. 4. c. 22.* contained no words compelling the plaintiff to give up his right to examine witnesses *vivâ voce*, at the risk of disallow-

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ance of costs, where they come from abroad. He cited *Tremaine v. Faith* (a), where the allowance of costs for witness's voyage back, as well as of his coming to and detention in this country, was sanctioned by the court of Common Pleas in analogy to the practice of the King's Bench, and superseding their own decisions in *Cotton v. Witt* (b), and *Schimmel v. Lousada* (c).

*Richards.* In *Tremaine v. Faith* the witness was the only party who could speak to the facts, and was expressly sent for for the purpose of that cause. Neither point is shewn here.

*Per Curiam.*—We will confer with the other judges in order to insure a uniformity of practice. It was afterwards announced that the other judges agreed in the opinion that stat. 1 *Will.* 4. c. 22. had not taken away the discretion formerly possessed by the master, to allow or disallow the expenses of witnesses brought from abroad, subject to the review of this court. And this court approved of the allowance in this instance, saying, that *Vaughan B.*, who tried the cause, had thought the presence of the witnesses peculiarly useful.

(a) 6 Taunt. 93.

(b) 4 Taunt. 55. See *Lopes v. De Tastet*, 7 B. Moore, 120.

(c) 4 Taunt. 696. Loss of time of witnesses will not be allowed for, *Willis v. Peckham*, 4 B. Moore, 300.

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THOMPSON *against* DICAS.

A Rule having been obtained to set aside a declaration in trespass for irregularity, with costs, on the ground of variance from the writ, which was in trespass on the case,

Since the uniformity of process act, 2 W. 4. c. 39. the writ is the commencement of the suit, and not merely process to bring a party into court. Therefore a declaration in a form of action, not warranted by the writ, will be set aside as irregular. The plaintiff may declare afresh if his cause of action will admit of declaring in the form warranted by the writ.

*Chilton* showed cause. The affidavit of the defendant is, that he was personally served with the writ of summons to the affidavit annexed, marked A., but does not go on to state that he was not served with any other writ. [*Bayley* B. The plaintiff does not show that.] Before 2 Will. 4. c. 39. for uniformity of process, the objection could not have prevailed. [*Bayley* B. It was then only process to bring the defendant into court, without having any thing to do with the nature of the action.] As since the act the writ must disclose the true cause of action, the motion should have been to set aside the writ; for in this case the declaration must be taken to have disclosed the true cause of action, and the writ becomes therefore irregular. In *King v. Skeffington* (a) the writ was set aside as irregular, for not strictly pursuing the form in the schedule; so in *Haskar v. Jarmaine* (b) a rule for setting aside the service of a writ for irregularity was discharged, on its appearing that the irregularity was in the writ itself. [*Vaughan* B. That writ was bad on the face of it for want of a date, according to 2 Will. 4. c. 39. s. 12. and Sch. No. I. This is a good writ. *Gurney* B. The writ is not bad, though the superstructure on it is.] The defendant should be left to demur.

(a) *Ante*, 318.(b) *Ante*, 381.



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BAYLEY B.—Before the act for uniformity of process, 2 Will. 4. c. 39., the writ was considered merely as process to bring the party into court, and a plaintiff might declare in any form of action suitable to his case, without reference to the writ. Since that act the writ of summons is the commencement of the suit (a), and must state the true form of action and its general nature; and in the declaration the plaintiff must show that his cause of action there detailed at length corresponds with that laid in the process. Now this writ of summons warranted a declaration in trespass on the case, and that declaration only; then, when the plaintiff declared in trespass, where was the vice? In the declaration, which had not followed the process. The declaration therefore must be set aside, though if the plaintiff's cause of action will warrant a declaring in trespass on the case, he may declare afresh. This is an irregularity which could not be a ground of demurrer.

The other barons concurred; but the affidavits were referred to the master to ascertain whether certain matter contained in them was irrelevant, and he having reported that it was,

Rule absolute without costs.

(a) *Alston v. Undershill*, ante, 427.

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MULLETT and Others *against* HUNT.

**C**ASE against a witness for not appearing as a witness upon a writ of subpoena. The declaration stated, that the plaintiffs, before the committing of the grievance thereafter mentioned, to wit, in *Easter term* &c., in the court of our lord the king, before the king himself, at *Westminster*, commenced and prosecuted a certain action against one *J. Hewitt*, in a plea of trespass on the case upon promises, and such proceedings were thereupon had in the said court &c. that a certain issue before then joined in the said action between the said parties was about to come on for trial, at the sitting of nisi prius holden at *Westminster Hall*, in the county of *Middlesex*, on the 7th *November* 1832, before the Right Hon. Sir *T. D. Knt.* Chief Justice, and by a jury of the country then and there chosen for that purpose, to wit, in the county of *M.* That before the trial of the said issue, and also before the committing of the grievances hereinafter mentioned, to wit, on 18th *November* 1832 aforesaid, the plaintiff prosecuted out of the said court &c. his majesty's writ of subpoena, directed to *P. V. St. Marc* the said defendant and *John Mullett*, by which said writ our said lord the king commanded them, and every of them, that all other things set aside, and ceasing every excuse, they

An action on the case lies against a witness for not attending a trial in pursuance of a subpoena, though the plaintiff withdrew the record in consequence of his absence, without the jury being sworn.

In such an action it is necessary to allege distinctly in the declaration that there was a good cause of action in the original suit, but an allegation that the defendant could have given material evidence for the plaintiff, without which the plaintiff could not safely proceed to trial, and that by reason of

his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced to, and did, withdraw the nisi prius record, was held sufficient after verdict.

An allegation that the subpoena was made known to and shown to the defendant was held to be supported by evidence that the subpoena was made known to, and conduct money taken by him, though the original subpoena was not shown, it not appearing that he requested to see it.

The plaintiff in an action for use and occupation had two witnesses to speak to the occupation. One of them could also have rebutted the defendant's expected set-off, but did not appear upon his subpoena. The cause was called on in the absence of counsel on both sides, and the record withdrawn by the plaintiff's attorney, who swore that he withdrew the record solely on account of the absence of the witness. Held, that the witness was liable to be sued accordingly.

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and every of them should be and appear in their proper persons before his majesty's right trusty and well beloved the said Sir T. D. Knt. his majesty's chief justice &c. &c. to wit, at *Westminster Hall*, in the county aforesaid, on *Tuesday* the 27th of *November* then instant, by nine of the clock in the forenoon of the same day, and so from day to day until the said cause should be tried, to testify the truth according to their knowledge in a certain action then in the court of our said lord the king, before the king himself, pending between the said plaintiffs and the said J. *Hewit*, on the part of the plaintiffs &c. &c.; which said writ the said plaintiffs afterwards and before the committing of the grievances thereafter mentioned, to wit, on the 14th *November* in the year aforesaid, caused to be made known to and shown to the said defendant, and then and there caused a copy to be left with the said defendant of so much of the said writ of subpoena as related to the said defendant, and then and there paid to the said defendant a certain sum of money, to wit, the sum of one guinea, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpoena; and that although the said cause was at the said sitting afterwards, to wit, on the 8th *December* 1832 aforesaid, called on to be tried before the said chief justice at *Westminster Hall* aforesaid, and although the said defendant was duly required to be and appear as a witness at *Westminster Hall* aforesaid on the day and year last aforesaid, at the sitting of the court, according to the tenor and effect of the said writ of subpoena and his duty in that behalf, and although the said defendant could have given material evidence for the said plaintiffs on the trial of the said issue, and without whose evidence the said plaintiffs could not safely proceed to the trial of the said cause; yet the

said defendant well knowing the premises, but not regarding &c. and contriving &c., did not nor would appear as a witness at *Westminster Hall* aforesaid, on the day and at the time he was so required to attend as aforesaid, according to the exigency of the said writ of subpoena, although he the said defendant was then and there solemnly called on for that purpose, and had no lawful or reasonable excuse or impediment to the contrary, but then and there wholly refused, neglected, and declined so to do, to wit, at *Westminster Hall* aforesaid, and by reason thereof and because the said plaintiffs could not safely proceed to the trial of the said cause without the testimony of the said defendant, they the said plaintiffs were afterwards, to wit, on the said 8th *December* in the year aforesaid, forced and obliged to and did withdraw the *nisi prius* record of the said issue; by means of which said several premises the said plaintiffs were forced and obliged to pay &c. divers costs, charges, and expenses of their monies, amounting &c., and were also greatly hindered and delayed in trying the said cause, and in the recovery of their damages in the plea aforesaid &c. &c. Plea, general issue.

At the trial before *Gurney B.* at the *Middlesex* sittings in *Easter* term, it appeared that *Mullett v. Hewitt* was an action for use and occupation; before the trial of which a writ of subpoena was issued, directed to the defendant and two other witnesses named therein. The plaintiff's attorney served a copy on the defendant directed to him only, and *Job Doe*, holding in his hand at the time the original subpoena, though he did not show or read it over to him. He, however, explained when the defendant was to attend, and paid the defendant a guinea conduct money, which he took. He accordingly attended for part of three of the four days during which the case was in the paper for trial.

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On the fourth day it stood No. 8 in the paper, and the previous causes having gone off in about an hour, was called on. The defendant being called on his subpoena, and not appearing, the record was withdrawn before the jury were sworn. The plaintiff's counsel were not then in court, but no one appeared for the defendant, and the plaintiff's attorney swore on the trial of this cause that he had his draft brief in court, and could have instructed other counsel then present, but withdrew the record solely on account of the absence of the defendant, whose evidence was required to rebut an expected defence of set-off. Another witness was present who could have proved the use and occupation by the then defendant. The learned baron having reserved several points for a nonsuit or new trial, the jury found a verdict for the plaintiff for 38*l.* 17*s.*

*Channell* then moved in arrest of judgment on two grounds:—First, the declaration states that the plaintiff withdrew the record. Now *Bland v. Swafford* (a) decided that no action lies against a witness for non-attendance, unless the cause has been called on, the jury sworn, and the plaintiff nonsuited for the non-attendance of the witness. *Barrow v. Humphreys* (b) was a motion for an attachment, in which the court thought a contempt had been committed by non-attendance. Secondly, it is not averred, nor does it satisfactorily appear that the plaintiff had a good cause of action in the original suit, *Pearson v. Iles* (c), *Hallett v. Mears* (d), *Amey v. Long* (e). In *Masterman v. Judson* (f) words of similar import were held after verdict sufficient. Here is no verdict, or words amounting to the requisite allegation. In 3 *Chitty on*

(a) 1 Peake's R. 60.

(b) 3 B. &amp; Ald. 598.

(c) 2 Doug. 556.

(d) 13 East, 15.

(e) 9 East, 473.

(f) 8 Bing. 224. See *Lamey v. Bishop*, 4 B. & Adol. 481*l.*, and 4 T. R. 611; 2 Saund. 151 n. (1).

*Pleading*, 428, the allegation is, that the evidence would have enabled plaintiff to have obtained a verdict. [*Bayley B.* In an action for escape this averment is necessary.]

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The court granted a rule to arrest the judgment on both points, *Bayley B.* saying, as to the first, that there appeared to him no necessity for incurring the additional costs of a nonsuit, which would ultimately fall on the witness absent, but that Lord *Kenyon's* authority ought not to be lightly overruled.

*Channell* then moved for a nonsuit or new trial on three points:—First, that the original subpoena was not shown to the defendant, as alleged; secondly, that he was not to be considered a necessary witness in *Mullett v. Hewitt*; and thirdly, that the plaintiff had sustained no injury, not being in readiness to try that cause, had the defendant been in attendance to give evidence. On the first point he cited *Starkie's Evidence* (a) to prove the necessity of showing the writ of subpoena when the subpoena ticket is delivered to the witness. Though that rule is laid down as to attachments, the peculiar language of the court brings this case within it; for the allegation of “showing” is coupled with that of “making known,” so that the making known the writ was effected by the showing it. *Bristow v. Wright* (b) shows that unnecessary statements must be proved, if not immaterial to the point in question. [*Bayley B.* They there failed to prove part of an entire contract. The averment here is, that the writ was “made known and showed,” not that it was made known by showing.]

On the second point, the allegation that the defendant was a witness, without whose testimony the plaintiff could not safely proceed to trial in *Mullett v.*

(a) Vol. I. 77, 110, 2d edit.

(b) Dougl. 654.

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*Hunt*, was not proved. He should have been shown to be an essential or indispensable witness, without whose presence the plaintiff could not have gone to trial with common prudence. It appeared that there was another witness to prove the use and occupation by *Hewitt*, the defendant being only material to rebut the evidence of a witness expected to be called on the part of *Hewitt* to prove a set-off.

On the third point, the plaintiff's counsel were not in court when the cause was called on. The plaintiff's attorney swore he had the draft of his brief in court, and that he could have got other counsel to hold it, but that being matter of courtesy cannot be a ground of argument, and he did not send for his own counsel or speak to any other. [*Bayley B.* An attorney is not to be heard in a cause, unless he has instructed counsel who are not in attendance. In that case a judge may suffer him to be heard. That was the practice of Lord *Mansfield* and Lord *Kenyon*, which I have pursued. Here, however, he swears he withdrew the record solely on the ground of the defendant's absence.]

BAYLEY B.—I am of opinion that no rule for a nonsuit or new trial should be granted. The first point on which it is sought for, is, that the original subpoena was not shown to the defendant. That is certainly necessary in order to bring a party into contempt, but for the purpose of maintaining this action I apprehend that it is not. There is a distinction between the service of a common rule, and that of a rule intended to bring a party into contempt. In the former case service of a copy suffices, unless the party requires to see the original. Here, the clerk having with him the original writ of subpoena, serves the defendant with the copy, and the defendant does not require to see the original, and takes the conduct

money as if he was satisfied with the service. Under these circumstances, I think that the allegation that the plaintiffs caused the writ "to be made known to and shown to the defendant" is divisible, so that the material part may be proved without the other. I think that that branch of it which states that the writ was "made known to the defendant" having been proved, the other "that it was shown to the defendant," may be rejected; for though unnecessary, it is not so closely connected with the other part of the allegation as to make it necessary to prove both, in order to prove the material part.

The second point was, whether the defendant must be considered as having been a necessary witness in this case. I do not say that in an action of this description it is necessary to make out that the witness is actually indispensable, or, as I term it, necessary; it would probably suffice to show him to be material. For if a plaintiff could recover 5*l.* by one witness who is present, but could recover 500*l.* by the testimony of another who is absent, though subpoenaed; or suppose a defence of set-off, and that one of the witnesses subpoenaed for the plaintiff has a document which will refute the testimony to be given in support of the set-off; could not the plaintiff in either case swear that the witnesses were material, and without whom he could not safely proceed to trial, though both cases might be launched without their presence? But it is contended here, that the defendant could not have been a necessary or material witness on the trial in question, because, looking at the situation of the cause when called on for trial, there was nearly a certainty that the plaintiff would have obtained a verdict without the defendant's evidence. The facts were, that the plaintiff had another witness besides the defendant to prove the use and occupation of the premises by the

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defendant in that action, but the present defendant was essential to repel the defence of set-off which was expected to be set up. That being the state of things, the plaintiff's attorney swears that he withdrew the record, and not on account of the absence of his counsel, but solely on account of that of the defendant. That was a question for the jury, as to which they were directed that the plaintiff was not entitled to a verdict for the damages alleged to be occasioned by the absence of the defendant, unless they were satisfied that the withdrawing the record was an act fairly done on that account and on that account *only*. They have found that it was so done, having heard the plaintiff's attorney, and the reasons assigned by him for the step he took.

VAUGHAN B. concurred.

BOLLAND B.—The service of a subpoena has no analogy to that of an attachment, which is a proceeding *in invitum*. Without deciding whether, for the purposes of an action, the service must be personal, or that the original subpoena must be shown in every case, I think the conduct of this defendant at the time has prevented the objection from arising. For instead of refusing to attend or allege the notice to be bad, he took his conduct money and attended in court on three days previous to that on which the trial came on.

*Comys* now showed cause. The first objection was, that in order to entitle a party to recover against a witness who does not attend on his subpoena, he must go on to swear the jury and be nonsuited, and cannot withdraw the record, as was done in this case, before the jury were sworn; and *Blund v. Swafford* was relied on. That case was however questioned in *Barrow v. Humphreys*, though not expressly overruled. [Lord

*Lyndhurst* C. B. That case was ultimately decided on the merits disclosed in the affidavits.] At all events, the judges there expressed a strong opinion that the party was guilty of a contempt by not appearing, though the cause was not called on for trial, and the plaintiff withdrew the record. The reason assigned by Lord *Kenyon* for his opinion in *Bland v. Swafford* was, that the court had no power to call a witness on his subpoena until the cause was called on and the jury sworn; but in *Hopper v. Smith* (a) Lord *Tenterden* held, that the counsel for the plaintiff had a right, on the cause being called on, to have a witness called on his subpoena without swearing the jury. The form of swearing the jury and proceeding to a nonsuit occasions unnecessary expense without object, and cannot be supported on principle. But a witness who neglects to appear on the writ, not only commits a contempt of the court, but also a wrong against the plaintiff, by compelling him to withdraw his record or be nonsuited. For that wrong an action lies; *Pearson v. Iles* (b).

On the other point, that there is no distinct allegation of a good cause of action in the original suit, *Masterton v. Judson* (c) shows that that is no objection after verdict, if it appear that by reason of the defendant's disobedience of the subpoena, the plaintiff received damage.

*Coleridge* Serjt. and *Channell* in support of the rule. *Amey v. Long* (d) distinctly shows that an action on the case will lie against a witness for not appearing in obedience to a subpoena, whereby the plaintiff is nonsuited. But that declaration averred that the plaintiff had a good cause of action in the

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(a) 1 M. & M. 115; S. P. *Aitkens v. Howell*, cor. Taunton J., Guildhall, May 10, 1832. MS.

(b) Doug. 556.

(c) 8 Bing. 224.

(d) 9 East, 473.

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original action; and that on the production of a certain warrant by the witness the plaintiff would have obtained a verdict. Next, whether this declaration is good after verdict, depends on the question, whether the jury must have found a good cause of action in order to give a verdict for the plaintiff in the original suit. This declaration does not say that the plaintiff could not go to trial without the defendant, but only that he could not go safely to trial without him. [Lord *Lyndhurst* C. B. Could any evidence have been material if the plaintiff had no cause of action? Is not the allegation that the defendant could give material evidence, substantially an averment that there was a substantial cause of action? But the jury have found that the defendant could have given material evidence in that action. Does not that impliedly ascertain that the plaintiff had a sufficient cause of action?] The allegation is not equivalent to an averment, that the plaintiff had a good cause of action. Suppose two witnesses to be both absent, each of whom, supposing both to be present, could give material evidence, would an action lie against both jointly, when the evidence of neither in the absence of the other, would in the result be material? [Lord *Lyndhurst* C. B. The fallacy is in this, that you assume both to be necessary to make out a good cause of action, though it may well be that a party has a good cause of action, though not in a situation to obtain a verdict at the trial in the absence of a particular witness. That is the case here. *Bayley* B. Suppose a bill, held by an indorsee, to be the cause of action, and that it is necessary to prove an acceptance and an indorsement by two witnesses, the absence of either would prevent the plaintiff's recovery; but you argue, that if both were absent he could not sue either.] He could not sue them jointly. To sustain this action injury must have been sustained,

then how could the evidence of one be material in the absence of the other? To sustain this action, injury to the plaintiff must be shown to accrue from the act of the defendant. [Lord *Lyndhurst*. The evidence of each would be material up to the point to which it extended, and the case put by my brother *Bayley* applies.] A man may give material evidence where there is no good cause of action, *e. g.* he may attest the signature of an agreement which may turn out afterwards to be inadmissible for want of a stamp. Many other cases might be put to show that an allegation that a witness can give material evidence does not sufficiently allege a good cause of action. [Lord *Lyndhurst* C. B. What was there in the count in *Mas-terman v. Judson* which is not in this?]

On the other question, *Bland v. Swafford* is in point, and is plainly distinguishable from *Barrow v. Humphreys*, which, however, only casts doubt on it; for the witness disobeys the writ by not attending the judge in court when the cause is called on, so that he is guilty of a contempt of the authority which issued the writ, whether the jury are sworn or not. That is the result of *Hopper v. Smith*. But no action will lie unless the plaintiff has incurred injury. Now a nonsuit would distinctly show a damage arising by the defendant's act, but withdrawing the record is only the plaintiff's act on his own apprehension of danger. If the jury were sworn, the witness might come in time to prevent the nonsuit. If a plaintiff is bound to have a jury sworn so as to suffer a nonsuit, in each case it will be clearly fixed, whether he sustained injury from the absence of the witness or not; whereas, though a plaintiff or his attorney may think that they could not safely proceed to trial without the evidence of a particular witness, no injury may, in reality, have been sustained by it. Here the plaintiff would probably have recovered on the evi-

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dence of the other witness. [*Bayley* B. Either the witness who was present could prove the whole case, or he could not. If he could, the other's absence is not material. If he could not, then his absence is.]

Lord LYNDHURST C. B.—Two objections were raised to the declaration in this case, the first that there was no averment that the plaintiff had a good cause of action in the original suit, and the second that it did not show that a nonsuit had taken place in the action. Upon the first point I am of opinion that a good cause of action sufficiently appears by the averment, so as to be good after verdict. The declaration states that the evidence which the witness would have given was material, and that the plaintiff could not safely proceed to trial without it. It appears to me that no evidence could have been material in that cause, if the plaintiff had no cause of action in it. The case appears to me to fall within the principle, if not the very words, of *Masterman v. Judson*. The record not having been withdrawn in that case, the expense of a nonsuit was not incurred, but the averments in both cases are substantially the same. As to the second objection, the rule was obtained on the authority of *Bland v. Staaford*, in which case Lord *Kenyon* is reported to have held that no action lies against a witness for non-attendance, unless the cause has been called on and the jury sworn. As has been already observed by my brother *Bayley*, Lord *Kenyon* reserved the point, and it never came before the court afterwards, the nonsuit having taken place on the merits. The decision was rested on the supposed want of jurisdiction in a judge *à nisi prius* to have the witness called on his subpoena before the jury were sworn. However, according to the practice of many years, as well as from the case of *Hopper v. Smith*, it appears that that opinion was

erroneous, and that a court at nisi prius has jurisdiction to suffer the plaintiff, before the jury is sworn, to call a witness on his subpoena, in order to withdraw the record if he does not appear. In *Barrow v. Humphreys*, Lord *Tenterden*, and the rest of the court of King's Bench, expressed doubts of the propriety of Lord *Kenyon's* ruling in *Bland v. Swafford*. Therefore, notwithstanding that case, I am of opinion that the plaintiff may maintain this action. The rule for arresting the judgment must, therefore, be discharged.

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BAYLEY B.—I am of the same opinion. It is here objected that the declaration does not aver that the plaintiff had a good cause of action in the action brought by him against *Hewitt*. I agree that such fact should appear on the face of the declaration; but though not expressly averred there, if it now appears from the various allegations that the plaintiff must have necessarily had such a cause of action, the verdict will cure the defect. No evidence which the defendant could have given would have been material, unless the plaintiff had a good cause of action. Then the allegations that the defendant could have given material evidence for him on the trial of the issue, and that the plaintiff could not safely proceed to trial without his evidence, must be held to imply that the plaintiff had a good cause of action.

The declaration then alleges that the witness, though solemnly called, did not appear, and that by reason thereof, and because the plaintiff could not safely proceed to trial without the testimony of the defendant, he was forced and obliged to and did withdraw the record of nisi prius. That raises the second objection, it being insisted for the defendant, on the authority of *Bland v. Swafford*, that this action is not maintainable, unless the cause been called on, the jury

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sworn, and the plaintiff nonsuited, on account of the absence of the witness. But I see no necessity for a plaintiff to go through those forms in order to incur extra expense. If a cause is called on, the plaintiff has a right to see if his witnesses are present, and if not, to consider what course he is to take; and if the judge permits the witness to be called on his subpoena before swearing the jury, but does not appear, I think the plaintiff may, by withdrawing his record, place himself in a situation in which he will incur smaller expenses than if he went on to be nonsuited. By this course also, the absent witness is benefited in the result. If he could show that he had sustained injury by the jury not being sworn, and that he attended at the time proper for his examination, that might instigate the damages; but in the absence of any such suggestion, I do not see how he can be aggrieved by the record being withdrawn, or that it would have been better for him if the plaintiff had suffered a nonsuit at a heavier expense. The fact that Lord *Kenyon* saved the point in *Bland v. Swafford*, shows his want of confidence in his impression at nisi prius; for that learned person was not in the habit of saving points and going on with a trial afterwards, if his mind was quite satisfied. That case is also materially shaken by *Barrow v. Humphreys*, where the court of King's Bench expressed their opinion that a witness by not appearing was guilty of a contempt, so as to be subject to an attachment, though the record was withdrawn without swearing the jury. The court give a remedy by attachment in order to avoid the more burdensome process of an action for damages, and I see no substantial distinction between the two for this purpose.

BOLLAND B.—The allegations that the defendant could have given material evidence in the cause, and

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that the plaintiff could not safely proceed to trial without his testimony, taken together, must after verdict be considered as sufficiently alleging a good cause of action in the original suit. The only authority in support of the other objection is *Bland v. Swafford*, in which, at the moment, Lord *Kenyon* appears to have distinguished between the jurisdiction of a judge sitting at nisi prius, and that of a court in banc, which could grant an attachment. That opinion must have rested on this ground, that he thought the proceeding to swear the jury and try the cause in the absence of a witness, was a necessary foundation for ulterior proceedings against him. The modern practice is different, and if the question is tried by reason and expediency there can be no ground for requiring the plaintiff to go on to be nonsuited. Again, if tried by the test, whether or no the court has power to issue an attachment in such a case as this, it appears from *Barrow v. Humphreys* that it has. In *Pearson v. Iles* (a), Lord *Mansfield* places the proceedings by attachment and the action for damages on the same footing. I am clearly of opinion that the judge had power to allow the party to be called on his subpoena without the jury being sworn, and that that course benefits the absent witness.

GURNEY B.—I am of the same opinion on both points. I have repeatedly known judges at nisi prius permit witnesses to be called on their subpoenas before swearing the jury, in order to withdraw the record. If that is done on account of the absence of the witness, I am of opinion that an action will lie against him. It is conceded that this plaintiff had a remedy by attachment, and I cannot see why he should not have a

(a) Doug. 561.



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remedy by action, the very foundation of which is, that he had sustained injury by the non-attendance of the witness.

Rule discharged.

WILLIAM JONES *against* AMOS JONES.

At a meeting of the parties to a deed of settlement on a marriage, the father of the intended husband, who was the only conveying party, executed and delivered the deed.

Just after, and before any other person had executed, the father of the intended wife objected to a clause giving a power of revocation; upon which the father of the husband immediately agreed that it should be struck out; that was accordingly done, the conveying party re-executed, and the others executed: Held, that no fresh stamp was

**C**OVENANT. The deed declared on was a marriage settlement, in which the plaintiff was trustee for the intended wife, and the defendant was father of the intended husband. The only plea was non est factum. At the trial, at the last *Herefordshire* assizes, before *Parke J.*, the following facts appeared as to the execution.

All the parties to the deed were assembled to execute it except the plaintiff, the trustee. The defendant was the sole conveying party. He executed and delivered the deed, and a witness attested his execution; but immediately after he had so done, and before it was executed by any other, the father of the intended wife objected to a clause containing a power of revocation by either the intended husband or his wife. It was accordingly struck out, the deed was re-executed by the defendant, and a new attestation of his execution indorsed. The rest then executed. For the defendant, it was objected that the deed became a different deed by the alteration in it, and could not therefore be given in evidence for want of a fresh stamp. The learned judge directed a verdict for the plaintiff, but gave leave to move to enter a nonsuit. A rule having been obtained accordingly, rendered necessary by the alteration, the deed being only in fieri when it took place.

*Richards* showed for cause, that the deed when altered was in fieri and not completed (a). The court then stopped him and called on

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*Maule* in support of the rule. This deed, after being delivered by the only conveying party, and his execution attested, was altered, not to carry into effect the original intention by rectifying a mistake, but to change the contract in a material respect. It therefore became a different deed and required a fresh stamp. It cannot be said to be in fieri after the defendant had executed, for not having delivered the deed as an escrow, but absolutely, he had then no locus pœnitentiæ. The non-execution by the trustees did not prevent the complete operation of the deed. At the moment of execution it would equally pass the property against the defendant's heir, or protect it against a subsequent act of bankruptcy by the defendant, or an elegit against him. Then if the deed has been executed, and might be enforced against the defendant, the stamp required to be on it at that moment is functus officio; *Schuman v. Wethered* (b). [*Bayley* B. There, a perfect annuity had been granted, and a new contract was agreed on between the parties.] In *Hill v. Patten* (c), and *French*, assignee of *Hill v. Patten* (d), a policy of insurance effected on a ship and outfit, was altered to ship and goods, without fresh stamp; and it was held, that it could not be enforced either as it stood originally or as altered. *Reed v. Deere* (e) supports those cases. [*Bayley* B. There the point was taken that the first deed was in fieri, but the court thought it was completed.] — v. *Lee* (f) is expressly in point. A deed having been executed, was

(a) See 1 Esp. N. P. C. 189; 2 Stark. C. N. P. 313; 1 id. 452.

(b) 1 East, 538.

(c) 8 East, 373.

(d) 1 Camp. 72.

(e) 7 B. & Cr. 261.

(f) 2 Eq. Cas. Abridged, 414, pl. 13.

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altered by consent of parties and re-executed. Held, that it could not be given in evidence as a new deed unless stamped afresh, for the whole deed was vacated by the alteration.

BAYLEY B.—I am of opinion that this rule ought to be discharged. It appears, that though there was a formal delivery of the deed by the defendant, it had not been so far perfected as to be incapable of alteration by the parties present. It was a marriage settlement, and the necessary parties to the execution were present. The father of the intended husband executes as the only conveying party; then at the moment after he has executed, and before the ink can be said to be dry, and while all the parties remained present, and before any of them had executed, a clause in the deed is objected to by the party interested for the intended wife. Then, before the deed has been ever passed to the persons intended to be benefited, the parties consent to have the alteration introduced, by striking out the clause objected to. The party who had executed it in its former state then re-executed it.

While these facts took place, I think the execution of the deed may be said to have been in fieri only, and that the alteration was a new moulding of the deed, which did not make it liable to be re-stamped. If circumstances like these were held to have the operation here sought to be given to them, the stamp laws would become a trap to harmless parties. They are intended to obtain a revenue by making certain stamps necessary when a deed is perfected, as well by the acceptance of the parties who are to take, as by the delivery by any who are to convey. In this case, before any opportunity was offered to the cestui que trusts to execute, a party interested for one of them objects to the deed. He might have said, we will not consent to the marriage

taking place on these conditions. The alteration then took place by consent of all the parties assembled. I am therefore of opinion, that as at the moment of execution an alteration was required by one side and acquiesced in by the other, the deed was not so far completed as to make a new stamp necessary, and the first stamp would cover the re-execution.

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VAUGHAN B.—The question is, whether the deed was in fieri only or factum and finished, and, under the circumstances, I think it was in fieri only. All the parties (except the trustee) had assembled to execute this deed. One of them had just sealed and delivered it, when, before the other contracting parties had executed, an objection was taken by one of them to a clause, which it was agreed should be struck out; upon which the party who had executed, re-executed, and re-delivered the deed, and the other parties, executed. On the ground that there was no consummation of the deed before it was altered, I am of opinion that no fresh stamp was required. The learned baron also alluded to *Kennerley v. Nash* (a), and *Peacock v. Murrell* (b).

BOLLAND and GURNEY Bs. concurred.

Rule discharged (c).

(a) 1 Stark, R. 452.

(b) 2 Id. 558.

(c) See *Ex parte Sawyer*, 17 Ves. 244; 1 Rose's Bankruptcy Cases, 141, decided on a bankrupt's certificate, before 6 G. 4. c. 16. s. 98. exempted that document from stamp duty.

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PAYNTER *against* WILLIAMS and Another.

A pauper settled in *G.*, resided for some time in the neighbouring parish of *St. F.* being relieved there by *G.*

The relief was discontinued on the ground of his not being resident in *G.*

The pauper afterwards was taken ill with consumption.

After the plaintiff, a medical man, had attended him eight or nine weeks, he sent a letter by the pauper's wife to the overseers of *G.* After

reading it one of them

said that the plaintiff

had been attending the

pauper some time before

then. They thereupon re-

newed their former weekly

allowance for maintenance,

and continued it until the

pauper's death, but neither

prohibited the plaintiff to

attend the

pauper or furnished him

with other

medical assistance: Held, that they were liable to pay so much of the plaintiff's bill for medicines &c., as was incurred after the letter was received.

**A**SSUMPSIT for medicines and attendances. Plea; the general issue. At the trial, before *Patteson J.*, at the *Lent* assizes for *Pembrokeshire*, the following appeared to be the facts of the case. The plaintiff, an apothecary residing at *Pembroke*, sued the defendants, as overseers of the parish of *Gumphreston*, for medicine and attendance furnished to a pauper belonging to their parish, who had been resident for some time at a house in the parish of *St. Florence*, which closely adjoined *Gumphreston*, and was in a consumption.

The plaintiff was not the parish apothecary of *Gumphreston*. The pauper had previously received relief in *St. Florence* from *Gumphreston*, but the latter parish had refused to continue it while the pauper resided out of their parish. The plaintiff's attendance began at the end of *March* 1829, eight or nine weeks after which the plaintiff sent the overseers of *Gumphreston* a letter by the pauper's wife, the contents of which were not in evidence, but on receiving which, one of them said, that the plaintiff had been attending the pauper some time before then. They thereupon renewed the weekly allowance until his death, which took place in *July* 1830, the plaintiff having, attended him during all that period. It was objected, that the pauper being resident out of *Gumphreston* when the advice and medicines were supplied, there was no sufficient evidence to show any employment of the plaintiff by the defendants to attend him. The learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict for 14*l.* the amount of his bill, or such part of it as the court should think fit.

*John Evans* having obtained a rule accordingly,

medical assistance: Held, that they were liable to pay so much of the plaintiff's bill for medicines &c., as was incurred after the letter was received.

*E. V. Williams* showed cause. First, was there a legal obligation on the defendants, as overseers of *Gumphreston*, to provide medical relief for a pauper belonging to their parish while resident out of it, without any suspended order of removal? For if not, as there was no express promise to pay, the law will not raise an implied promise from the moral obligation on the defendants to provide for the poor. *Watson v. Turner* (a) only shows, that where a sick pauper resides out of his parish, the obligation of the overseers of his parish to relieve him is not legal but moral only, and that therefore an express promise is there necessary to bind them. In *Atkins v. Banwell* (b), the overseers of the parish where the pauper's illness happened were under a legal as well as moral obligation to relieve, and it was therefore held, that the law would not raise an implied promise by the parish in which he was settled, to repay the other parish for medical assistance provided for him. Lord *Ellenborough* said, that in *Watson v. Turner* the circumstance of the special promise to pay the plaintiff's bill after it was contracted made all the difference; adding "a moral obligation is a good consideration for an express promise, but it has never been carried further so as to raise an implied promise in law." *Lamb v. Bunce* (c), and *Tomlinson v. Bentall* (d) are inapplicable, the medical aid having been there supplied to casual poor, under the legal obligation of the parish where they were found, so to relieve them.

In *Wing v. Mill* (e) the decision in favour of the apothecary must have turned on the express promise

(a) Bull. N. P. 130, 147, 281, and remarked on in the note to *Wennal v. Adney*, 3 Bos. & P. 249, and in Sel. N. P. 56; *Wing v. Mill*, 1 B. & Ald. 105.

(b) 2 East, 506.

(c) 4 M. & S. 275.

(d) 5 B. & Cr. 738; and see *Gent v. Tomkins*, id. 746, n.

(e) 1 B. & Ald. 104.

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of the overseer founded on his moral obligation to pay. [*Bayley* B. Only the overseer who promised was there sued (a).] The pauper there received relief from his own parish, while he resided and had medical aid in another, his illness being occasioned, not by accident, but gradual decay. Lord *Ellenborough* said, "In this case both the legal and moral obligation obtain." That with the overseer's express promise to pay the plaintiff's bill is the true ground of the decision, and the other observations of Lord *Ellenborough* and *Bayley* J. are extrajudicial. Then the fact of the pauper's relief during his illness by the parish to which he belonged, makes no difference. Since 35 *Geo.* 3. c. 101. s. 2., there can be no hardship in laying down that the parish to which a pauper does not belong shall relieve the pauper while he is in their parish; for an order for his removal might have been made and suspended during his illness, and by another order the expenses incurred during his suspension might be obtained. Could the overseers of *Gumphreston* be indicted for suffering the pauper to die of want of medical aid when he was in *St. Florence*? [Lord *Lyndhurst* C. B. The overseers of the parish where he was, were bound to provide him with medical assistance, but might have insisted on an order of removal made before providing it.] *Le Blanc* J. in *Atkins* v. *Banwell*, says, "There was a moral as well as legal obligation to maintain the pauper in his illness in the parish where he was at the time." That shows that *St. Florence* could not relieve itself of responsibility until they had removed the pauper or got a suspended order. No legal obligation can exist to relieve a pauper out of the parish. If *assumpsit* will lie for medicines on an implied contract to pay for them, it will also lie for any other necessities,

(a) See *Watson* v. *Turner*, Bull. N. P. 130, and *Malkin* v. *Vickerstaff*, 3 B. & Ald. 89.

*e. g.* for the difference between the sum allowed by a parish, and that actually expended in supplying the pauper with necessaries.

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Secondly, supposing the defendants to be under a legal obligation to furnish medical aid to the pauper in *St. Florence*, do the circumstances raise an implied promise by them to do so? Since *Lamb v. Bunce* (a), and *Tomlinson v. Bentall* (b), it must be conceded that if parish officers act on their knowledge of medical attendance and do not repudiate it, they are liable. [*Bayley B. Tomlinson v. Bentall* was a claim on the parish officers of a parish where the pauper was not settled. Lord *Lyndhurst* C. B. Suppose the legal obligation to exist, there was a communication to the overseers by which they appear to have been made acquainted with the plaintiff's attendance while it was going on, and there was no repudiation of it. Those are strong circumstances from which to imply a promise to pay, and an adoption of the plaintiff's services.] [*Bayley B.* The demand need not be entire; the plaintiff might be entitled to recover for the attendance given after that letter. In *Lamb v. Bunce* the accident required immediate aid, so that there was no time to get an order.] Here, the defendants might have chosen to employ their own surgeon, or contested their liability; and no presumption of a promise or request by them arises, as in *Lamb v. Bunce*, from any fact of the plaintiff's having previously attended the parish poor.

*J. Evans* and *Whitcombe* showed cause.

The question undisposed of is, whether the defendants, as overseers of *Gumphreston*, were legally liable to provide medical aid for this pauper while resident in

(a) 4 M. & S. 275.

(b) 5 B. & Cr. 738.



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*St. Florence?* Now *Wing v. Mill* is precisely in point. Weekly relief was there given to the pauper while resident out of the parish to which he belonged, and medical aid was rendered him in a disease occasioned not by an accident but by gradual decay, without a previous retainer by the overseers of his parish. They, however, were held liable to pay for it. [Lord *Lyndhurst*. An express promise existed in that case.] That is not a material difference from this case; for if there was a legal obligation on the overseers of *Gampthreton* to pay, no express promise by them was necessary; and if there was not, a promise by them would have been void as nudum pactum. The cases on casual poor must not be confounded with this. Since *Lamb v. Bunce* and *Wing v. Mill* the rule seems to be, that where the illness of a pauper is of a permanent kind, not proceeding from an accident, which would oblige the parish he is in at the time to relieve him as casual poor, without remedy against the parish in which he may be settled, the overseers of the latter parish are liable, without express promise, to pay for medical aid afforded him, if they know that it is so given, and do not interpose to hinder it. Then in what manner does his receipt of relief from the parish to which he belongs, while he is resident in another parish, differ the case? [Bayley B. Why was he not casual poor here? and why did not *St. Florence* obtain an order of removal?] The continuance of relief made that step unnecessary. [Lord *Lyndhurst* C. B. *Watson v. Turner* is not a case of casual poor. In every page of *Buller's Nisi Prius*, where it occurs, it is put as elucidating the rule of moral obligation. *Lamb v. Bunce* shows that where there is a legal liability on overseers to afford medical aid, a contract by them to pay for it may be inferred from equivalent circumstances, *e. g.* their not objecting while it was going on. Here the nonsuit proceeded on

the supposed absence of legal liability and of any express promise founded on moral obligation. *Bayley B.* The express promise in *Watson v. Turner* distinguished it from *Atkins v. Banwell*, where there was none.] It is said this pauper could not be casual poor in *St. Florence*, being permanently resident there (a). [*Bolland B.* Lord *Ellenborough* lays down a wider rule in *Rex v. Chatham* (b). *Nolan* in his *Poor Laws* (vol. 2. 437) says, "When a poor person not settled in a parish becomes chargeable from accident, sudden calamity, or any other circumstance, he falls within the description of casual poor, and the parish in which he is detained becomes bound to relieve and take care of him."—*Bayley B.* It does not appear that he was too ill to be removed to his own parish; had he been so removed, the overseers would have been bound to furnish medical aid, but might have selected their own medical man, and with his assistance might have judged of what was necessary. But are they under a legal obligation to pay any medical person who might be called in without their knowledge or assent? Here is evidence that the overseers knew of the plaintiff's attendance. Moral obligation may concur with legal liability, but it cannot attach on overseers distinctly from their legal liability to relieve. That depends on the statute, by which every one is entitled to relief, either where he lives or is settled. *Watson v. Turner* has unquestionably been considered as authority that an express promise following a merely moral obligation will raise an *assumpsit*; but if that case shall be found to rest on moral obligation only, it may in that view be much doubted (c). But "moral obligation" is probably used there as *contra-distin-*

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(a) See *Rex v. Bury St. Edmunds*, 10 East, 27.

(b) 8 East, 498.

(c) See the note to *Wannall v. Adney*, 3 B. & P. 240.

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guished to "no moral obligation," or to a case without any obligation, and not to a legal obligation. Again, Serjt. *Williams* cites it in *Wennall v. Adney* as a case of legal liability, "because they were bound by law to provide for the poor." *Le Blanc J.* in *Atkins v. Banwell* treats the obligation on overseers to maintain a pauper in his illness, in the parish where he is at the time, as both moral and legal. Whether in that case, or in *Watson v. Turner*, the paupers were casual poor or not, it is sufficient they were chargeable in the parish where they resided. The fact of relief in this case distinguishes it from *Atkins v. Banwell*, where the parish in which the pauper was settled never recognized any liability. [*Bayley B. Le Blanc J.* in reality thought that the parish in which the pauper was at the time of his illness was morally and legally bound to maintain him.] *Wing v. Mill* is only maintainable on the ground of the legal liability of the overseer of the parish to which the pauper belonged, with or without an express promise; for if he was not legally liable, this promise would be nudum pactum only, and the argument of *Copley Serjt.* on his behalf, taking the pauper to be casual poor in the parish where he resided, would have been unanswerable, when he said, "The poor laws are mere arbitrary enactments, and do not carry moral obligations beyond the legal liability which in this case attached on the parish which was the residence of the pauper." [Lord *Lyndhurst C. B.* If a legal obligation exists to render medical aid, there must still be a retainer of the plaintiff or a promise to pay him.] *Lamb v. Bunce* (a) and *Gent v Tomkins* (b) are cases of casual poor within the narrowest definition. In the latter case the parish in which the accident happened was held liable to find medical aid, and that in which he

(a) 4 M. &amp; S. 275.

(b) 5 B. &amp; Cr. 746 n.

was settled was not. [*Bayley* B. The new trial was granted on the ground that the jury should confine the damages to the attendance subsequent to the defendant's promise.] Then is this case one of mere moral or of legal obligation? The plaintiff attended during the illness, a decline, which lasted more than twelve months; after eight weeks he gave notice to the defendants of his attendance, and 13*l.* 1*s.* was incurred afterwards.

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LORD LYNDHURST C.B.—I am of opinion that the verdict should be entered for the plaintiff for so much of this bill as was incurred after the letter was sent to the defendants by the pauper's wife. I come to that conclusion upon the peculiar facts of this case. The pauper being settled in *Gumphreston*, appears to have resided some time in *St. Florence*, and had had a weekly allowance there from the former parish, which had been discontinued, the overseers saying they would pay him no more till removed into his own parish. He afterwards became ill, but not so much so that he might not have been removed; he was attended by the plaintiff for eight or nine weeks. A letter was taken over from the plaintiff to the overseers of *Gumphreston* by the pauper's wife. Though its contents are not in evidence, we may infer from the subsequent acts of the defendants that it related to the plaintiff's attendance on the pauper: at all events, after its receipt the weekly allowance was renewed by the overseers of *Gumphreston* till the pauper's death. That shows their knowledge that the pauper was in *St. Florence*, and amounts to a request by them that he should not be removed, and should continue to reside in *St. Florence*, and to a promise to allow what was requisite. They must be taken to have known of the plaintiff's attendance.

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Then, in my opinion, their conduct amounted to an acceptance of his services, and created a legal liability.

BAYLEY B.—I have ultimately arrived at the opinion that the plaintiff is entitled to recover 13*l.* 1*s.* The legal liability of the parish is not of itself sufficient to entitle the plaintiff to recover, unless there is a retainer or an adoption of the plaintiff's attendance by the parish to be charged with the payment. It does not follow that the legal liability of a parish to furnish a pauper with medical assistance makes them liable to pay any medical man who may be employed, or may choose to attend him. A proper person must be employed, but they may in the first instance choose who he shall be. Nearly all the cases are cases of legal liability. *Wing v Mill* is such a case; but I do not think it a case of legal liability only, for I think that retainer or adoption must also be proved. In that case there was evidence of both. The parish officers there knew of and sanctioned the attendance of the medical man, for they directed him to send in his bill. Here the pauper living in *St. Florence* belonged to *Gumphreston*, which latter parish for some time made him a weekly allowance for maintenance while living in *St. Florence*, but discontinued it on the ground that the pauper lived out of their parish. Medical attendance afterwards became essential, and is supplied by the plaintiff for some time without communication to the parish of *Gumphreston*, at the plaintiff's own peril, and without any legal claim on *Gumphreston* for that attendance. However, after his having attended the pauper eight or nine weeks, a letter is sent by the plaintiff to the overseers of *Gumphreston*, the contents of which do not clearly appear, but no difficulty arises as to the general tenor of its contents, which may be inferred from accompanying circumstances. The parish of

*Gumphreston* afterwards renewed those payments for maintenance, which they had discontinued, and thus acquiesced in the pauper's remaining in *St. Florence*, and showing themselves to be no longer desirous to have the pauper removed into *Gumphreston*, in order to complete or ensure their liability. If they had continued to desire his removal to take place they should have repudiated the plaintiff's services or appointed a medical man of their own. As they did not do either, the inference arises that they were not only legally liable to maintain the pauper, but that they agreed to pay the plaintiff for his medical attendance on him. I am therefore of opinion, that the plaintiff may recover 13*l.* 1*s.* for his attendance, after their receiving that letter. Another circumstance shows that the defendant *Williams* had received it, for he says, when asked to pay, "The attendance began before Mr. *Paynter* wrote to me." That shows his opinion that the contract was entire, and that he was not liable for any part.

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VAUGHAN B.—I concur, relying entirely on the special circumstances of this case, and without disturbing *Wing v. Mill*. My difficulty was, whether it should not have been left to the jury to say, whether the defendants recognized the plaintiff as medical attendant on the pauper or not.

BOLLAND B. concurred.

Rule absolute to enter a verdict for  
plaintiff for 13*l.* 1*s.*

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A declaration on an award contained several counts: Held, that on a general verdict, the plaintiff was only entitled to the costs of one count.

*WARD against BELL.*

THE declaration was in assumpsit on an award, and contained several counts, some of which had been added on summons, before *Alderson J.* at the *York* assizes. At the trial one submission and one award were proved; the plaintiff had a verdict, and the master allowed him the costs of all the counts. A rule was obtained by *Wightman* to review the taxation, by striking out the allowance of costs, except on one count; against which *Pollock* and *Starkie* showed cause. [*Bayley B.* The plaintiff proved only one cause of action. Suppose that at the trial it had been insisted for the defendant, that the plaintiff was on that account not entitled to a verdict on more than one count, but that the judge had directed it to be entered on more than one count, the defendant might tender a bill of exceptions.]

Lord LYNDHURST C. B.—The evidence was only of one submission and one award; then how can the plaintiff be entitled to demand from the defendant the costs of more than one count?

Rule absolute.

*JONES against FITZADDAMS.*

In order to have a rule absolute in the first instance to discharge a defendant who has been in custody 12 months for a debt under 20*l.*, pursuant to 48 G. 3. c. 123., notice of the motion must be given; and as by the act it must be made in term time, the rule must be drawn up to show cause in term, and not at chambers in vacation.

**A**DDISON moved on the last day of term to discharge the defendant under 48 G. 3. c. 123., he having been in custody twelve months for a debt under 20*l.*; but the court would not grant a rule absolute, as no notice of the application had been given; and on reference to the words of the act, "on application for that purpose in term time," refused to suffer it to be drawn up to show cause at chambers in vacation, but granted it to be drawn up for the next term.

FAGG *against* BORSLEY.

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**A**FTER several special pleas had been pleaded in covenant, plaintiff had leave to amend, the defendant to be at liberty to plead *de novo*, or demur. The declaration was amended by merely adding new counts setting out a new title, with the same breach as in the old counts, which remained unaltered. No fresh notice to plead was indorsed. The old pleas remained, but plaintiff signed judgment as for want of a plea, without giving a rule to plead, or demanding a plea. A rule having been obtained to set aside the judgment for irregularity, it was shown for cause by

If a declaration is amended after plea, and the defendant, having liberty to plead *de novo*, stands on his original pleas without availing himself of that liberty, the former plea will stand, if applicable to the declaration as amended.

*W. H. Watson*, that, according to *Huckvale v. Kendal* (a) a demand of plea is not required to enable a plaintiff to sign judgment after delivering an amended declaration. He had an affidavit of merits.

*Steer contra.* In that case a rule to plead had been given. Here the original pleas could not be treated as a nullity, whether the defendant thought fit to plead *de novo* under the option given him by the order or not.

**BAYLEY B.**—If none of the special pleas originally pleaded were answers to the breaches in the new count, the plaintiff might sign judgment generally as to the part unanswered, or there would be a discontinuance. Signing judgment is not to be encouraged; but if there be a plea before the declaration is amended, and by the order the defendant is at liberty to plead *de novo*, but he does not do so, the former plea will stand, if it can be applied with propriety to the amended declaration.

Rule absolute—costs to be costs in the cause.

(a) 3 B. & Ald. 137.



1833.

GOUBOT *against* DE CROUY.

A court will not set aside a return of non est inventus to a capias, on affidavits of collusion between the sheriff and defendant. If the return be good on the face of it, it can only be impugned in an action for a false return.

**B**USBY moved to set aside a return of *non est inventus* in the bailiwick from the delivery of the writ till 18 *February*, and that on that day and till the return the defendant was and yet is in the service of the *Sicilian* minister at the *British* court as a domestic servant. The affidavits charged collusion between the sheriff and the defendant, in strong terms; but the Court refused to interfere, on motion, saying that the return was good on the face of it, and stated the facts, which could only be impugned before a jury in an action for a false return, and not tried by a court on affidavits.

Rule refused.

WEBB *against* LAWRENCE.

It is sufficient, within 2 *W. 4. c. 39.* to describe a defendant in a capias (Form No. 4.) as of *Kent Street*, in the county of *Surrey*. A capias is good if indorsed "Bail for 40*l.* and upwards." No date is required to the indorsement.

**A** Capias described the defendant as only of *Kent Street*, in the county of *Surrey*. The indorsement had no date, and as to bail was as follows: "Bail for 40*l.* and upwards by affidavit."

*Mansel* obtained a rule to set aside the capias, and discharge the defendant out of custody, for the above among other causes, under 2 *W. 4. c. 39.*

*Crowder* showed cause.

*Per Curiam*.—First, As a place and county are given, and the act does not require the number of the house or the parish to be stated, the form in No. 4. of the schedule of 2 *W. 4. c. 39.*, is sufficiently complied with. Next, that form also appears sufficiently complied with as to the marking for bail, for the defendant could not be held to bail for more than 40*l.*; nor does the form No. 4. require any date to the indorsement.

Rule discharged with costs.

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ALLEN and Another, Assignees of BAKER a Bankrupt,  
against CAMERON.

**A**SSUMPSIT. The declaration was on an agreement dated 30th September 1828, by which the bankrupt and J. A. jointly and severally promised and agreed, during the then autumn, to procure, sell, and plant 70,000 plants or trees, of the description therein mentioned, in and on certain lands of the defendant, and also that they should and would at their own costs *well and sufficiently keep in order the trees aforesaid*, for the space of two years next after the planting thereof, and that such of them as should die during such period of two years aforesaid, (except from injury by sheep, game and cattle,) should be replanted in the autumns of 1829 and 1830, by them, and at their like costs, with trees or plants of a similar description respectively as those so dying as aforesaid; and the defendant promised and agreed with them to pay them for the said plants, and for planting and keeping the same as aforesaid, 220*l.* 10*s.* viz. two-thirds within one month next after such planting should be finished, and the other third at the expiration of the two years during which they had *agreed to keep in order* and replace the said trees in manner aforesaid. Counts for goods sold, and for work and labour. Pleas, general issue. At the last *Gloucestershire* assizes, before *Barke J.*, it appeared, that the trees were sent from *Bedminster*, near *Bristol*, to the neighbourhood

Where A., for a valuable consideration, contracted to sell and plant 70,000 trees on certain lands of the defendant, and also "well and sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, and that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him:—Held, that evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissi-

ble to reduce the damages in an action on the agreement for their price, and for planting them.

*Seemle*, that this agreement meant to keep in order, not by pruning only, but by weeding and clearing the ground about the trees.

*Seemle*, that if the terms of an agreement are equivocal, and do not distinctly explain what is to be done by either party, the price may be taken into consideration in ascertaining the right construction.

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of *Swansea*, and there planted, according to the agreement; that 5000 were sent in 1829, and 3000 in 1830, to replace those which had died. The plaintiffs sought to recover the last instalment, it being admitted that the first was duly paid. No complaint had ever been made by the defendant respecting the trees or their condition; but at the trial his counsel offered to prove in reduction of damages that most of them had been choked by grass and weeds, so that at the end of the two years the whole were not worth 5*l.*, and insisted that by the contract the ground was to be kept weeded and cleared about the trees during the above period. *Campbell v. Jones* (a) was cited for the plaintiffs, to show that the neglect complained of was, at utmost, only the subject of a cross-action, and that the keeping the trees clean was not a condition precedent to paying the last instalment, but an independent covenant. The learned judge rejected the evidence, and left the construction of the agreement to the jury, telling them that in his opinion the ground ought to have been "kept in order" by weeding. They, however, found that the trees were to be kept in order by pruning only. Whereupon, there being no evidence of what was actually meant, the plaintiffs had a verdict for the instalment due.

*Maule*, having obtained a rule for a new trial, on the ground that the agreement had been wrongly construed by the jury, and that the evidence should have been admitted,

*Talfourd* and *Justice* showed cause. If the words "to keep in order" meant more than pruning and general management, it need not have been specially provided that the trees which died should be replaced.

(a) 6 T. R. 570,

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[*Vaughan B.* No notice to weed the plantations seems to have been given.] But the principal ground of supporting the verdict is, that the undertaking to keep the trees in order for two years, was only part of the consideration for the promise to pay the last instalment at the time agreed on. Now, in 1 *Saund. Rep.* 320 b. Serjeant *Williams* lays down, that "where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant might be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of it by the defendant, without averring performance on the declaration." He then cites *Boon v. Eyre* (a), as well as *Campbell v. Jones* (b), relied on at the trial; adding, "Hence it appears that the reason of the decision in those and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore, the law obliges him to perform the covenant on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration." In *Campbell v. Jones* the neglect to teach the art of bleaching materials for paper was held ancillary only to the permitting the defendant to bleach them in a particular mode during the existence of the patent by which it was protected; and that as that right had been transferred to the defendant, he could not refuse to pay a last instalment of the consideration money, though he might have sustained some damage from

(a) 1 H. Bla. 273, note; 2 W. Bla. R. 1312, S. C.

(b) 6 T. R. 570.

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not being duly instructed by the plaintiff. That also shows, that if the bankrupt was bound to keep the trees in order pursuant to the agreement, and neglected to do so, that was not matter in reduction of the damages. [*Bayley B. Campbell v. Jones* was a case of covenant. Was not the rule settled in *Street v. Blay (a)*, that where the plaintiff has on his part been guilty of a breach of his part of a contract of sale, the defendant has a right to insist on the damages being reduced in an action for the price? There a dealer who had bought a horse, warranted sound, sold it, and afterwards rebought it. The horse was unsound when first sold. In an action by the vendor for the price, it was held that he might give the breach of warranty in evidence to reduce the damages, though after exercising dominion over the horse by parting with him to another, he could not require the vendor to take him back (b), or resist an action for the price of him.] The warranty, in that case, extended over the whole contract. *Poulton v. Lattimore (c)* was an action for the price of seed, warranted to be good new growing seed; but the buyer was suffered to show in reduction of the damages that it did not correspond with the warranty, without having offered to return it. This is a contract for a specific sum. [*Bayley B.* That is to be paid for the whole work and labour to be done; then can the plaintiff have the whole price without doing the whole labour?] If he cannot, the whole contract would be opened on the least default, and rescinded quoad the specific price agreed to be paid. But at all events, the defendant should have complained of the treatment of the trees during the two years while the bankrupt could have remedied it, or shown that

(a) 2 B. & Adol. 456.

(b) *Parker v. Palmer*, 7 East, 274; and see *ante*, 232.

(c) 9 B. & Cress. 259.

he had performed his contract. *Hopkins v. Appleby* (a), was an action for barilla sold and delivered. It was mixed, and used in making soap without complaint or notice to the seller (b). At the trial the defence was, its inferior quality to the warranty. Lord *Ellenborough* said, it was incumbent on the defendants to give the seller an opportunity to establish his case by the opinions and judgment of intelligent men on the subject. [*Bayley* B. That was said to guide the jury in their consideration of the case. *Gurney* B. cited *Fisher v. Samuda* (b).] *Groning v. Mendham* (c) was an action for the price of clover seed sold by sample, and it was held, that before the defendant could enter into a defence that the seed delivered did not correspond with the sample, he must prove that he had given the plaintiff notice of the variation. [*Bayley* B. *Poulton v. Lattimore* seems to have shaken that case.] The jury have put a reasonable construction on the agreement, and must have thought the bankrupt not overpaid for what was actually done. They also cited *Carpenter v. Cresswell* (d), *Davidson v. Gwynne* (e), *Cock v. Curtoys* (f).

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*Maule* supported the rule. First, evidence that the plaintiff had not performed his contract to keep the trees in order, in a perfect manner, was admissible in reduction of damages. *Campbell v. Jones* is distinguishable, being an action on a specialty, where it was not necessary to aver consideration or performance of the condition precedent. Then the declaration would have been sufficient, had it stated the defendant's covenant to pay, and that he had not paid. But in this action of assumpsit imperfect performance of the agree-

(a) 1 Stark. N. P. C. 477.

(b) 1 Camp. 190.

(c) 1 Stark. N. P. C. 257.

(d) 4 Bing. 409.

(e) 12 East, 381.

(f) 1 Saund. 320 b.

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ment may be proved in mitigation of damages, for consideration must be averred and proved. The special count is here only a circuitous mode of stating the accompanying common count. The general issue raises the question, whether the defendant can take advantage of the non-performance by the plaintiff of a part of his contract, which forms the consideration of the defendant's promise. Here, the agreement to plant and keep the trees in order, is a condition precedent to the plaintiffs' recovery of the last instalment. *Fisher v. Samuda* (a) shows, that the defendant could not have brought a cross action for the bankrupt's neglect to keep the trees in order, and that the bad quality of an article sold should be proved for the defence, either to defeat the action, or at least to abate the damages.

2dly, If the non-performance of the contract by the party whom the plaintiffs represent, can be admitted to proof, that non-performance consisted in not weeding the trees. That was necessary to ensure 70,000 trees in good order at the end of the two years. During that time pruning would not be necessary. [*Bolland* B. If the agreement was meant only to keep in order by pruning, that common term might have been used. The clause for replanting such as should die within two years, except from injury by sheep, &c., shows that injuries arising from other causes were to be provided for by the planters.] The price contracted for is much larger than the value of the trees with the expense of planting and merely pruning them for two years.

BAYLEY B.—There clearly ought to be a new trial in this case. The first question is, whether the jury have put a proper construction on the agreement; and the second, whether the evidence was properly re-

(a) 1 Camp. 190.

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jected. On that will depend the further question, whether the plaintiffs are entitled to recover the whole amount they claim, or only a reduced sum, in consequence of the partial failure to perform the contract. The learned baron having stated the agreement, proceeded thus: What is the meaning of the words "well and sufficiently kept in order" as regards young trees? I should have thought that they were not kept in order unless any natural impediment to their growth was removed, and that if obstructed in their growth and deprived of nutriment by weeds and grass, they were *primâ facie* not "kept in order." I say *primâ facie*, because "kept in order" being an equivocal expression, the price is a material consideration to be looked to in construing the agreement. If the value of the trees was such as nearly to exhaust the whole price agreed for, the words "keeping in order" might well receive a more limited construction, viz. by being applied to the trees only; whereas if it was not of an amount nearly to exhaust that price, the surplus must have been intended to be given for some additional object. Had not these words been equivocal, I should not have thought the amount agreed for could form an ingredient for ascertaining the construction of this agreement, since *Gabay v. Lloyd* (a) established that the amount of premium in a policy cannot be taken into consideration in order to ascertain what was the risk incurred; but the words used being equivocal, it is a question of fact what construction should be put on them under all the circumstances, and I think that another jury should determine on its real construction.

Secondly, are the plaintiffs liable to make any abatement from the whole price on account of the non-fulfilment of that part of the contract which the bank-

(a) 3 B. & Cress. 793.



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rupt and *J. A.* promised to perform? *Street v. Bley* rests this question on a plain and satisfactory principle, not leaving a defendant to a cross-action to recover for the damage sustained by him by a plaintiff's inadequate fulfilment of his contract, but entitling him to deduct the amount from that claimed by the plaintiff. This case appears to me a very plain illustration of the rule there laid down, and strongly to evince its propriety. The nurseryman's agreement was not only to supply trees, but also to keep them in order, in consideration of ~~220~~l. 10s. Then the keeping them in order was part of the consideration, so that if they were not of a proper size and quality, or were not kept in proper order, the difference between their value and that of proper trees kept in good order, forms an item which the defendant ought to be entitled to deduct from the sum claimed by the plaintiffs without being driven to a cross-action. The plaintiffs can only recover the sum stipulated for, after deducting the difference in value of the trees by not keeping them in order; so that if by the plaintiff's neglect they are worth nothing, he cannot recover any thing; for he is only entitled to recover what he deserved to have, according to the manner in which he had performed his contract. As the verdict was not perverse, though contrary to the direction, the new trial must be on payment of costs.

VAUGHAN B.—I am of opinion that by the agreement to keep in order more was meant to be done than merely pruning these young trees. But as the meaning of the words is doubtful, the price stipulated for becomes material; for if it considerably exceeds the mere value of the trees themselves with the expenses of planting and pruning them, an inference arises that it was intended that something more should be done. On the other point, I think that the rule of setting off

damages accruing to a defendant from the non-performance by a plaintiff of a part of the contract to be performed on his part, is a very fair and convenient rule. This appears a very fit case for its application; but as the verdict arose from no misdirection of the judge or perverseness of the jury, the new trial must be on payment of costs.

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BOLLAND B.—I agree that there should be a new trial; but I differ from my brothers as to the propriety of taking the price into consideration in construing a contract; for the mere price agreed on may be influenced and diminished by many other circumstances, besides the mere value of the article to be furnished, or work to be done; for instance, by desire of reputation or some other object of a similar nature. I consider price, therefore, as a fallacious and uncertain test by which to form a judgment of a contract. In the case before us, if the words keeping in order, taken with reference to the subject-matter of contract, imply removing grass and weeds from the roots and not pruning only, the first and most expensive operation must be done, whether the price exceed the value of the trees and the planting them or not.

GURNEY B. concurred.

BAYLEY B. added, I think that price can only be taken into account where the terms of the agreement to be construed are equivocal, as in this instance, and in no other case.

Rule absolute.

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1833.

DOE on the demise of ANN MEYRICK, *against*  
MARY MEYRICK.

*A.* died possessed of family estates, as well as of land bought by himself, and other land acquired by exchange of some of the family property for it. Among the land acquired by such exchange was that in question. He devised all his lands &c., and real estates whatsoever, which he had heretofore from time to time purchased from the different persons in the several deeds and conveyances thereof named &c., to his sisters *A. M.* and *E. M.* : Held, that the estate acquired by the testator in exchange, passed to the devisees as part of the purchased estates described in the will.

**EJECTMENT** by the surviving devisee of the Rev. *W. Meyrick* for *Galanddu* farm in *Anglesea*. The lessor of the plaintiff had a verdict, subject to the opinion of the court on the following case.

The Rev. *W. Meyrick* was owner of considerable estates in *Anglesea*, and before the making of the will hereafter mentioned, purchased, for money considerations, several estates in the said county, the yearly rents of which purchased estates amounted at his death to 100*l.* a year. He also exchanged several parts of the family estate for other lands; among the rest he exchanged a part with one *H. Griffith* for the premises in question, situate in *Llanfechell* parish, and which, by indenture dated 12th November 1796, *Griffith* conveyed to him in fee in consideration of certain lands to be conveyed by *Meyrick*, and of 30*l.* to be paid by him, not as the value of the premises comprised therein, but merely to balance and equalize the exchange. On the execution of the indenture of 12th November 1796, *H. Griffith* and *W. Meyrick* entered respectively into the possession and receipt of the rents and profits of the said exchanged premises: and the said *H. Griffith* is still in possession and receipt of the rents and profits of the premises given him in exchange, and the said *W. Meyrick* entered into and continued in possession and receipt of the rents and profits of the said premises in the said indenture mentioned, called *Tyddyn Gil*, and *Galanddu*, and continued in possession of the said premises called *Galanddu* until the time of his death, on 15th October 1819. *W. Meyrick* made his will dated the 25th June 1816, which was

duly executed and attested in such manner as is required by law, being as follows :

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“I give and devise all and every my several messuages, tenements, mills, lands, rents, hereditaments, and real estate whatsoever, situate in the several parishes of *Llanfechell* (and five others named in the will) or elsewhere in the county of *Anglesea*, which I have heretofore from time to time ‘purchased’ from different persons in the several deeds of conveyances thereof named, and which are now vested in me in fee simple, or in some other person or persons to and for my use and benefit, unto and to the use and behoof of my two sisters, *Ann Meyrick* and *Elizabeth Meyrick*, and their assigns, in equal shares, for and during the term of their joint and natural lives, and for the life of the survivor of them; and from and after the end, expiration, or sooner determination of either and both of these estates, by forfeiture or otherwise, in their lifetimes or the lifetime of the survivor of them, then to the use and behoof of the *Rev. Lewis Hughes* and *John Jones*, the younger, of *Beaumaris*, gent. and their heirs, during the joint and natural lives of my said two sisters, and during the life of the survivor of them, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall be and require, but nevertheless to permit and suffer my said two sisters, or their assigns, and the survivor of them, and her assigns, to receive and take the rents, issues, and profits of the several messuages, tenements, mills, lands, rents, and hereditaments, for their use, in equal shares, during their joint natural lives, and for the life of the survivor of them; and from and immediately after the decease of the survivor of my said two sisters,

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I give and devise all that messuage or tenement, farm, lands, and hereditaments and premises, with the appurtenants thereto belonging, called by the name of *Lucy*, otherwise called *Tyddin Lucy*, situate in the parish of *Llanfechell* aforesaid, now or late in the occupation of *John Parry*, his undertenants or assigns, and all my estate, right, title, and interest in and to the same, (being part and parcel of my purchased real estates aforesaid,) unto and to the use and behoof of my friend *Robert Pritchard*, gent., his heirs and assigns, for ever: And as to, for, and concerning the remainder of all those the aforesaid real estates by me heretofore purchased as aforesaid, I give and devise the same and every part and parcel thereof unto and to the use and behoof of my dear brother *Thomas Meyrick*, his heirs and assigns, for ever." The tenement called *Lucy* otherwise *Tyddyn Lucy*, devised by the said will, was purchased by the said *W. Meyrick* for a money consideration. The said *W. Meyrick* died on the 15th October 1819, seised of the estate called *Galanddu*, without revoking his will, leaving the said *Thomas Meyrick*, his only brother and heir at law, and his said two sisters, *Ann* and *Elizabeth*, him surviving. The said *Elizabeth Meyrick* died on the 21st June 1821, leaving her brother her surviving. Upon the death of the said *W. Meyrick*, the said *Thomas Meyrick* came into possession and receipt of the rents and profits of the said premises called *Galanddu*, and continued so until the time of his death, which took place on the 27th January 1831; and the defendant *Mary Meyrick*, the widow and devisee of the said *Thomas Meyrick*, has ever since his death continued in adverse possession and receipt of the rents and profits of the said premises called *Galanddu*, for the recovery of which premises this ejectment is brought by the said *Ann Meyrick*, the lessor of the plaintiff, as

devisee as aforesaid of the said *W. Meyrick*, against the defendant *Mary Meyrick*, as devisee of the said *Thomas Meyrick*.

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The question for the opinion of the court is, whether the said premises called *Galanddu*, conveyed to the said *W. Meyrick* as above mentioned, passed by the will of the said *W. Meyrick* to *Ann Meyrick*, the lessor of the plaintiff, as part of his purchased estates.

*Follett* for the plaintiff. The question is, whether or not the estate which was obtained from *H. Griffith* passes under the description of estates "from time to time purchased," and which the testator devised to his two sisters. The term "purchase" must be taken in its legal sense; *Littleton's Tenures*, s. 12., is, "Also purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed." Lord *Coke* in his *Commentary* says, "A purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift, for that is in law also a purchase. But a descent, because it cometh merely by act of law, is not said to be a purchase, and accordingly the makers of 1 *Hen. 5. c. 5.*, speak of them that have lands by purchase or descent of inheritance. And so it is of an escheat or the like, because the inheritance is cast upon the lord or a title vested in him by act in law, and not by his own deed or agreement, as our author here saith." If the will contains no words to show that the testator used the word "purchased" in the popular sense, viz., as bought, the legal meaning must prevail and the lands pass to the plaintiff. Now this will is conceived in legal terms and shape. Besides, the

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testator would not have spoken of the lands &c., which I have heretofore from time to time purchased from different persons in the several deeds of conveyances thereof named, and which are now vested in me in fee simple "unless he had meant to devise all lands conveyed to him by deeds." It is for the defendant to show that those words are to be confined to the lands not received in exchange. [Lord *Lyndhurst*. C. B. Suppose a word used in a will to have a popular, by which I mean a general meaning, and also a technical meaning, which sense would you ascribe to it?] The technical sense, unless it appear on the face of the will that the intention was different, otherwise it may be that the court would make the will and not expound it only.

*Lloyd* for the defendant. If the word "purchased" had as single and definite a legal meaning as the word "heir," it might lie on the defendant to show that it was intended to bear a popular and not the technical sense. But "purchase" has also the popular meaning of "bought," and the terms of the will show sufficiently that the testator meant only to pass the lands which he had bought. For, having a family estate and other lands acquired by money purchase, he made the distinction between the two species of property, by letting the first descend to his brother and devising the other to his sisters, with remainder as to *Galanddu* to his brother, without giving him any of the stock or present enjoyment of the farms. But the devise of *Tyddin Lucy* to his sisters, and after the death of the survivor of them to *Pritchard*, explains from the will itself the sense in which he used the word "purchased." That clearly appears from the case to have been "bought," and whether the meaning of "purchased" was popular or legal, conveyances were necessary, so that the reference to them cannot be of importance.

*Follett* in reply. The popular meaning of words varies in different counties. [Lord *Lyndhurst*. That raises the difficulty where words not technical are used. Suppose a technical phrase is used, you must *primâ facie* construe a will according to the legal construction of that phrase, unless the testator's intention does not appear from the will to have been different; but does that rule apply to a phrase either equivocal, or having a technical meaning and a general one?]

The last is the case here; but suppose the consideration to have been 500*l.* in money, and the rest in money's worth, as jewels &c., the buyer would say he had purchased the land. "Dying without issue" is construed against a devisee by its legal sense of indefinite failure of issue, and is yet equivocal by having a different popular sense also. [*Bayley* B. This is in substance an exchange, the money is only given by way of owelty of partition. *Primâ facie*, purchased means bought.] The difficulties pointed out arise from not adhering to the legal signification. Had the lands been devised as those the testator "bought of *A. B.*," the same difficulty would arise. The lessor of the plaintiff has only to show that *Galanddu* comes within the meaning of the words in the will. Now, do the facts detailed in the case relating to those lands "stand well with the words of the will" (*a*), or fill out and follow the description in it? [*Bayley* B. Suppose the title to the lands acquired by exchange to be bad, and the lands to be recovered back from the devisee, who would be entitled to take the lands given in exchange for them?] There would be the same difficulty if lands were recovered from the heir, but he who was to have the substituted lands would have the

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(a) See this language of Lord Coke, 8 Rep. 155, cited in *Miller v. Travers*, 8 Bing. 251.



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lands originally given in exchange. The heir at law would be his trustee for them.

*Cur. adv. vult.*

LORD LYNTHURST C. B. afterwards delivered the judgment of the court. The testator, in this case, died seised of property in *Anglesea*, some parts of which consisted of family estates, other parts of lands purchased for money, and other parts of lands exchanged for parts of the family estate, and for which he had also paid a balance in money. His devise is in these terms: "I give and devise all and every my several messuages, tenements, mills, lands, rents, hereditaments, and real estates, whatsoever, situate in the several parishes of *Llanfechell*, (and five other parishes named in the will,) or elsewhere in the county of *Anglesea*, which I have heretofore from time to time purchased from different persons in the several deeds of conveyances thereof named, and which are now vested in me in fee simple, or in some other person or persons to and for my use and benefit, unto and to the use and behoof of my sisters, *Ann Meyrick* and *Elizabeth Meyrick*; and the question is, whether the lands acquired by the testator in exchange for parts of the family estates, passed by the devise to his sisters? Now whether we consider the word "purchased" in its general or its legal sense, we are of opinion that the lands so acquired are comprehended within it. They were "purchased," if not with money, at all events with other lands given for them, and that word must receive its usual interpretation, unless something on the face of the will itself clearly shows that the testator intended to use it in a different sense. No such circumstance appears. We are therefore of opinion that the land in question passed by the devise, and that there must therefore be

Judgment for the lessor of the plaintiff.

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PICKIN *against* GRAHAM and Another.

**A**SSUMPSIT on a bill of exchange by the indorsee against the drawers. The facts which appeared at the trial before *Alderson J.*, at the *Yorkshire* summer assizes in 1832, were as follows. The bill in question was dated 26th *April* 1832, and drawn at a month's date by *Whitham*, who lived near *Sheffield*, as agent to the drawers, on *Wragg*, to whom they had sold iron. It was accepted by *Wragg*, payable in *London*; indorsed first to *Jarvis*, then to *Potter* an attorney at *Rotherham*, and by him to the plaintiff, who paid it in to his account at a country banker's at *Retford*. While the bill was running, *Wragg* became distressed, and executed a bill of sale to his brother, of which *Potter* knew. On 29th *May*, when the bill became due, *Potter* saw *Wragg*, and in consequence of what he said of his distressed circumstances, told *Jarvis* the bill would probably not be paid; and *Jarvis* on that day informed *Whitham* what he had heard. At about twelve the next day, 30th *May*, *Whitham*, who acted as general agent for defendants, called at *Potter's* in *Rotherham* on the subject of the intimation received from *Jarvis* the day before, and after having seen *Wragg*, after some conversation he said, "If that be so, I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* next *Tuesday* I will pay you the money. On that day, which was market day at *Sheffield*, *Whitham* saw *Potter* there, and asked him if he had brought the bill; he answered, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* on *Tuesday* I will pay the money." The bill was not returned by the holder to the last indorser until ten days after this conversation, and the drawers did not receive notice of dishonor in due time: Held, that the terms of the promise made to the indorser by the agent to the drawers not being unconditional, and having been made at a time when no laches could have been committed in giving due notice of dishonor, did not waive the necessity to give that notice.

A bill was drawn in *Yorkshire* and accepted, payable in *London*. During its currency, the affairs of the acceptor became embarrassed to the knowledge of the last indorser, who being in *Yorkshire* on the day the bill became due, told the person who indorsed it to him, that it would probably not be paid. It was dishonored in *London* on that day; but before notice of that fact could arrive, the agent to the drawers called on the last indorser at *Rotherham* in *Yorkshire*, and in the course of conversation about the bill being likely to come back, said, "I sup-

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that he had not yet got it. He in fact never received notice of dishonor until 9th *June*, nor did *Jarvis* or the defendants receive it until the 11th, when they respectively refused to pay, on the ground that they had not had notice of non-payment in due time (a). The plaintiff having been nonsuited, with leave to move to enter a verdict for the amount of the bill, if the promise by *Whitham* should be held sufficient to dispense with notice of dishonor, a rule was afterwards obtained, against which

*J. Williams* and *Creswell* showed cause, citing *Blesard v. Hirst* (b), and *Borradaile v. Lowe* (c), *Lundie v. Robertson* (d), *Goodall v. Dolly* (e), and *Hopley v. Dufresne* (f), to show that the defendants were at liberty to refuse payment in consequence of the plaintiff's laches in not giving notice in time, notwithstanding what had passed in the interim between *Whitham*, their agent, and *Potter*, at a time when they were not only ignorant of that laches, but when none had been in fact committed.

*Pollock* and *Hoggins* urged contra, that *Whitham*, as agent of the defendants, and being aware that the bill would probably be dishonored by the acceptor, might waive the necessity to give notice of dishonor, and promise to pay the bill. They cited *Brett v. Levett* (g), and *Potter v. Rayworth* (h), to show that it is sufficient if the promise be made to a party to the bill

(a) The fact was, that in the interim the plaintiff had been absent from home, and the parcel containing the bill returned unpaid by the *London* correspondent of his country banker, never reached his hands until Saturday 9th *June*.

(b) 5 Burr. 2670; Bayley on Bills, 236.

(c) 4 Taunt. 93.

(d) 7 East, 231.

(e) 1 T. R. 712.

(f) 15 East, 275.

(g) 13 East, 213.

(h) 13 East, 417.

though he is not a party to the record. They also cited *Lundie v. Robertson* (a).

*Cur. adv. vult.*

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VAUGHAN B.—In this case, which was argued the other day before my brothers *Bolland* and *Gurney* and myself, the action was on a bill of exchange by the indorsee against the drawer. The bill had been drawn on *Wragg* for value by *Whitham*, as agent of the defendants, and was payable one month after date. *Wragg* accepted the bill payable in *London*, and it was indorsed by *Whitham* to *Jarvis*, by him to *Potter*, and by *Potter* to the plaintiff. It was in evidence, that while the bill was running the affairs of the acceptor were known in *Yorkshire* to have become embarrassed, and it was intimated in conversation that his acceptance would probably be dishonored. This intimation only amounted to this, that he had executed a bill of sale of his effects, and that it was therefore probable that the bill would not be paid. In consequence, *Whitham*, the agent for the defendants, called on *Potter* in *Rotherham*, at mid-day on the 30th *May*. No notice of the dishonor in *London* on the 29th could have reached the parties by that time, and it is upon the conversation which took place on the occasion of that call, that the plaintiff insists on his right to recover. *Whitham*, after conversing with *Potter* about the expected dishonor of the bill, and about the distressed circumstances of the acceptor, said to *Potter* "If that be so, I suppose there is no alternative but for me to take up the bill : and if you will bring it to *Sheffield* next *Tuesday* I will pay it." He saw *Potter* on the *Tuesday*, asked for the bill, but it had not yet been returned to the plaintiff. There had been even then no notice or intimation of

(a) 7 East, 231.

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dishonor so as to make *Potter* liable, for he received no notice until 9th *June*, and the defendants none until 11th *June*. They then refused to pay, on the ground that notice had not been given in due time. It was contended for the plaintiff that he was entitled to recover, on the ground, that though the defendants had no actual notice they had knowledge of the expected dishonor, and *with that knowledge* promised to pay. And it was said, that though the right of a party liable on the bill to receive notice of the dishonor in due time is undoubted, yet it may be dispensed with by a party entitled to such notice, and that a jury may infer, from a promise to pay by him, that the notice was waived or was regular. Now there is a wide distinction between notice and knowledge, as applied to bills of exchange and promissory notes. It was first laid down in *Tindal v. Brown* (a) that notice means something more than knowledge, and a variety of later cases establish that mere knowledge of dishonor is not that notice of dishonor of a bill which is required in order to fix the prior parties to a bill. Thus in *Baker v. Birch* (b) the acceptor went to the drawer, (who was the defendant,) and telling him that he the acceptor could not take up the bill, gave the drawer 5*l.* 5*s.* towards that object. Yet the defendant, though he took it and promised to take up the bill, was held discharged of his liability for want of due notice of the dishonor. Again, the bankruptcy or known insolvency of an acceptor affords no answer to the want of due notice of dishonor; *Esdaile v. Sowerby* (c), *Russel v. Langstaffe* (d). It is however argued, that there was in this instance an absolute unqualified promise to pay. Such a promise, made by a drawer or indorser

(a) 1 T. R. 167, *per Ashurst J.*; and see *Buller J.* id. 170.

(b) 3 Camp. 107.

(c) 11 East, 113.

(d) Doug. 115; and see cases *ante*, 656.

after a bill has become due and has been dishonored, implies that the notice and presentment were regular, and juries have been properly directed to presume accordingly. But what passed in this case seems to me to amount only to this, that in a conversation about the expected dishonor of the bill, the agent of the drawers, supposing that they had no alternative but to pay, used the expressions relied on in contemplation of a regular notice of dishonor about to be received. His words import a fear of being compelled to pay if the bill came back in due course, and that as it would probably do so, there would then be no other course to be adopted but to pay it. That, in my opinion, does not amount to an absolute promise to pay the amount. A numerous class of cases establishes that a promise by a party liable on a bill to pay it after its dishonor, admits the existence and *rité actum* of every thing necessary to make him liable, viz., the presentment and regular notice (a). Though it is unnecessary to go through the long head roll of them on a point of such common occurrence, it may be well to mention that in *Borradaile v. Lowe* (b), Sir James Mansfield, in delivering his judgment, said, "I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable on his indorsement, except where an *express* promise to pay the bill has been proved. Now the defendant's letter contains no such express promise, but in a great measure shows that the defendant was writing under the supposition that he was liable." He afterwards says, "I cannot consider the letter as conveying an absolute promise to pay at all events, whether Trevor & Co. did or not, and I think in this case it would be

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(a) See 7 East, 231; 2 Camp. 105, and 188; 4 id. 52; 1 Taunt. 12., &c., collected Bayley on Bills, 4th ed. 374.

(b) 4 Taunt. 93.

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too much to fix the defendant by any such implied promise." In most of the cases where the defendants have been held liable, they have either made an express promise to pay, or a promise when they had a full knowledge at the time that they were discharged. *Goodall v. Dolly* (a), *Blesard v. Hirst* (b), and other cases, show, that a promise made without knowledge of the laches is not binding, and does not estop the party from insisting on a discharge on account of it. I am therefore of opinion that this plaintiff was rightly nonsuited. It was here admitted that no regular notice of dishonor was given. Then does the admission or promise dispense with the necessity for it? I think not; for it took place before the dishonor could be known, and was not absolute.

BOLLAND B.—I agree in opinion. The parties to the action are the holder and the drawer. Now *Potter* had been the drawer, and it was known at the time of the conversation that he was not the holder, so that the promise was limited to the event of the bill coming back to him in due course. It is as if *Whitham* had said to *Potter*, "If the bill comes back to you in due course of business I fear I must pay it; I know my liability, and also the protection to which the law entitles me." *Prideaux v. Collier* (c) shows the strict necessity for notice of dishonor. There, the day before the bill became due, the holder applied to the drawee, who said that he had no effects, but that effects would probably be procured by the time it was due. The next day the defendant, the drawer, told the holder he hoped the bill (then due) would be paid, and that he would endeavour to get effects to pay it. Yet, the bill not being presented until the day after, Lord *Ellenborough* held the drawer to be discharged.

(a) 1 T. R. 712.

(b) 5 Burr. 2670.

(c) 2 Stark. N. P. C. 57.

GURNEY B.—I am clearly of opinion that the promise in this case was not such a promise as would dispense with notice of dishonor.

Rule discharged.

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### HODSON against TERRILL.

**A**SSUMPSIT for 20*l.* money had and received.—

Plea, general issue. At the trial before *Denman* C. J. at the *Warwickshire* Lent assizes, the following agreement was proved:—

“The *Birmingham Union Cricket Club* agree to play at *Warwick*, on *Monday* next the 8th of *October*, a match at cricket, for twenty sovereigns a side, with the *Warwick* club; a deposit of 5*l.* is placed in the hands of Mr. *Terrill* on behalf of the *Warwick* club; the same for the *Birmingham* club. Wickets to be pitched at ten, to begin at half-past ten, or forfeit the deposit. Wickets to be struck at half-past five, unless the game is finished before. To be allowed to change three men, according to the list sent this morning.

(Signed) *J. Cook, jun.*  
*H. Terrill.”*

A game at cricket for the sum or value of 10*l.* or upwards, is illegal within the second section of stat. 9 Ann. c. 14.; therefore an action for money had and received lies against a stakeholder, to recover a stake of that value deposited with him after notice not to pay it over.

So, though the game was not finished in one day.

The parties met on the 8th *October*, and each deposited 15*l.* with the defendant as stakeholder to make up their respective stakes, the plaintiff paying 15*l.* as agent for the *Birmingham* club. Two umpires were appointed. Each club had an innings on that day, at the end of which the *Warwick* club was sixteen runs a-head with eight men to go in. The next day, before beginning to play, the *Birmingham* club, for the first time, objected that a member of the *Leamington* club



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was playing for their antagonists, and not receiving a satisfactory answer, refused to play out the game, though the wickets were pitched, and the umpire for the *Warwick* club called "play" at eleven o'clock. The plaintiff, as agent for the *Birmingham* club, gave the defendant notice to pay over their deposit to him and to no other person; but the defendant paid it over to the *Warwick* club on receiving their indemnity. The learned chief justice nonsuited the plaintiff on several objections, which were afterwards relied on by the counsel who showed cause, but gave leave to move to enter a verdict for the plaintiff for 20*l.* if this court should differ from him in opinion. A rule was accordingly obtained in *Easter* term, Lord *Lyndhurst* and *Bayley* Bs. intimating that *Eltham v. Kingsman* (a), which was cited, did not go so far as to decide that in every case of wager a man may withdraw the stake when the other is on the point of winning the game, but that in the case of an idle or foolish wager he may claim his own stake before the event is decided.

*Goulburn* Serjt. and *Hill* showed cause. The plaintiff cannot recover the deposit, unless cricket is an illegal game within 9 *Ann.* c. 14. s. 1. and the consideration was therefore made illegal by that act; for betting to any amount was previously legal. Now that act, by providing that all notes &c. or securities whatsoever, given, granted, or entered into by any person whatsoever, where the whole or part of the consideration of such securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards &c., bowls or other game or games whatsoever, or betting on the sides or hands of such as do game at any such games &c., shall be utterly void, does not declare any game illegal or avoid contracts relating to

(a) 1 B. &amp; Ald. 683.

them, but merely the "securities" by which it is intended to enforce them. (a). Had it been intended to avoid the contract, it would have been done by express words, as in a previous act against gaming, 16 Car. 2. c. 7. Many other cases show that a contract may not be void, though the security given to enforce it is; *Robinson v. Bland* (b), *Vaughan v. Whitcomb* (c), *Walpole v. Saunders* (d), *Alcinbrook v. Hall* (e). *Jeffreys v. Walter* (f) was an action of debt on a bond given to secure money won at a cricket-match played by *Kent* against *All England*; and though the court inclined to adjudge cricket to be a "game" within 9 Ann. so as to avoid the bond, no judgment was given. In that case, as the "security" was sought to be enforced, the statute might apply, for it does not declare any game illegal. Nor is cricket a malum in se, so as to constitute this money paid on a consideration illegal at common law, independently of the statute, as in the instance of a boxing match, where an action for money had and received was held maintainable, even after the battle, against a stakeholder, for the bet deposited with him; *Hastelow v. Jackson* (g).

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BAYLEY B.—The game need not be illegal in order to make a bet exceeding 10*l.* on the side of a person playing it illegal. The amount of the bet makes it illegal, as was held in *Lynal v. Longbotham* (h), which

(a) *Barjeau v. Walmesley*, Stra. 1249. Section 9 excepts from the act play at any of the games therein described, in royal palaces, where the sovereign is actually resident, and during such residence, so as such playing be for ready money only.

(b) 2 Burr. 1077.

(c) 2 N. R. 413.

(d) 7 D. & R. 130.

(e) 2 Wils. 309.

(f) 1 Wils. 220.

(g) 6 B. & Cr. 221. See *Hunt v. Bell*, 1 Bing. 1, as to sparring matches.

(h) 2 Wils. 360. Foot races are mentioned in 16 Car. 2. c. 7. to which statute 9 Ann. c. 14. must relate; per *Willis*, C. J. id. 38.

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was debt by a loser on a foot race, to recover from the winner the amount of a bet on it exceeding 10*l.*, and paid over to him.] The defendant had judgment, for the declaration did not show that the party running was playing at a game called a foot-race, but that does not show that the bet could not have been recovered back at common law, for it was debt on the stat. 9 *Ann.* c. 14. brought within three months, pursuant to sect. 2. Now that is the only mode by which any sum amounting to 10*l.* fairly lost at one time by betting on the side of a player, and paid over to the winner, can be recovered from him by the loser; *Thistlewood v. Cracroft and Darley* (a). [*Bayley* B. The point there decided was, that money fairly lost and paid could not be recovered except in an action of debt on the statute, but here the stakeholder paid over after notice that the party objected, which makes the difference.] Even if the payment by the stakeholder, after notice, of a sum, the receipt of which being recoverable under sect. 2 by penal action, may be said to be an illegal act, be also illegal as a payment in his own wrong, the stakeholder would be entitled to the benefit of the principle acted on in *Thistlewood v. Cracroft*.

Secondly, cricket is a game of skill, not of chance; and therefore it is not within sect. 2., so that the plaintiff could not recover, even in the mode there pointed out. The legislature acknowledges the distinction, for by sect. 1. securities for money lost at all games, whether of skill, as tennis and bowls, as well as chance, are made void; but games of skill are omitted in sect. 2., the words being "cards, dice, tables, or other game or games whatsoever," and the subsequent general words which follow the preceding particular words must be taken to mean games ejusdem generis with those pre-

(a) 1 M. &amp; S. 500.

viously mentioned; per *Holroyd J.*, *Rex v. Whitnash* (a). Sect. 5. does not apply, for it is not argued that the money was fraudulently won. Even if the contract be illegal, the rule in *pari delicto melior est conditio possidentis* applies; *Howson v. Hancock* (b), *Vandyck v. Hewitt* (c). If this action is maintainable, it may follow that a party may recover his stake from the stakeholder who has paid it over to the winner, while another person may recover under section 2 of 9 Ann. c. 14. against the winner.

The Court were about to give judgment without hearing argument in support of the rule, when a doubt being suggested whether as the game was not over on the first day, the money could be said to be lost "at any time or sitting" within sect. 2., they called on

*Humfrey* for the plaintiff, to argue that point.—The money was lost at "one time," viz. on the second day, when the event took place. [*Bayley B.* The acts on the first day contributed to the loss on the second; different sittings at intervals on the same day may be taken as one, if the company do not part; *Bones v. Booth* (d)]. Suppose a horse race to be run in three heats on different days, would it not be within the statute? Besides a stakeholder resembles an arbitrator, *Eltham v. Kingsman* (e), and his authority to pay over was here revoked. [*Bayley B.* That case does not go so far.] Can it be said who lost the game? [*Bayley B.* That was for the jury; if the *Birmingham* club declined to play out the game, on the ground of an objection which turned out to be unfounded, it may be said the game was lost.]

*Cur. adv. vult.*

(a) 7 B. & Cr. 601. See *ante*, Vol. II. 178.

(c) 1 East, 96.

(d) 2 Bla. R. 1226.

(b) 8 T. R. 575.

(e) 1 B. & Ald. 683.

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BAYLEY B. now delivered his judgment.—While I was stating my opinion in this case, on a former occasion, a doubt, to which I shall presently advert, having suggested itself to me, I thought it right to take time to consider it. The first question was, whether, where a party has deposited a sum exceeding 10*l.* with a stakeholder to abide the event of a game at cricket, the game for that stake is illegal by 9 *Ann.*, c. 14; and after full consideration, we are of opinion that it is.

The words of the second clause of the statute have been held in many cases to be as extensive as those in the first, though the games of tennis and bowls are mentioned in the first and not in the second. That is the reasonable construction of them. Both sections have been held to apply to foot races, though not mentioned in either, and to other games in which bodily exertion is requisite. We see no reason, therefore, why the words of section two should be confined to games *ejusdem generis* with cards &c. only, and are of opinion that the statute embraces other games. The title and preamble of the statute express its object to be the preventing of excessive gaming, that is, gaming for stakes higher than the sum thereby fixed, by making such gaming illegal. Then the playing for a stake above the sum fixed, at any game, is illegal, as “excessive gaming.”

The next question is, whether upon the second section, read in connection with the first, the plaintiff can recover from the stakeholder his stake deposited with him before it is paid over? The second section says, that if persons losing the sum or value of 10*l.* by any of the aforesaid games, shall pay or deliver the same or any part thereof, they shall be at liberty, within three months then next, to sue for and recover the same from the winner, with costs of suit by action of debt. Then if the loser pays his loss he may reco-

ver it back within a limited period; but if he pays and does not sue in the time and manner appointed by the act, other means are provided by section 3 for recovering the sum by any person who will sue at law, assisted by a bill in chancery, to compel the owner to discover the amount won. On the whole act it is clear that the legislature intended to prevent the practice of staking higher sums than are mentioned in it, and to make it improper to pay them to the winner, if lost. Then it follows that the party gaming may stop his money in the hands of the stake-holder by giving him notice not to pay over the money, and that after such notice he may sue him in an action for money had and received.

Here there was a dispute whether or not the money was lost. I do not enter on that question, as our opinion is not founded on that; but we take it for granted that it was lost; then had it been a legal stake, the stakeholder would have been bound to pay it over to the plaintiff; but as it was an illegal stake, and notice not to pay it over was given to the stakeholder, he was bound not to do so. Having done so he has done it in his own wrong.

It was argued that if the plaintiff could sue at all, he should have sued the winner in debt, and within three months; but as the action is not against the winner, but against the stakeholder, it is therefore not necessarily laid in debt or limited to three months. The stakeholder held this money in order to pay it to another, but as it was illegal for that other to receive it, the party depositing it had a right to stop it in transitu, by giving the stakeholder due notice not to pay it over. Then he may recover by the ordinary remedy, by one man against another for detaining his money. The form of action, therefore, is right.

I doubted, during the argument, whether if the

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stake was illegal, the deposit was so too, so as to make the maxim, *melior est conditio possidentis*, apply; but *Hastelow v. Jackson* removed that doubt. It shows that the right of the party depositing to recover back his own stake in this form of action, after notice to the stakeholder not to pay it over, remains, though the event on which it was staked was illegal. As to the doubt I entertained the other day, I am now satisfied that there was no foundation for it. The words are, "who shall lose &c. at any time or sitting," and as this game was not over in one day, it suggested itself to me that those words did not apply to this case; but on deliberation, I am of opinion that they are sufficient and intended to embrace one transaction, though it occupy more than one day to complete it. My brother *Bolland* suggested to us the instance of a bet to go 1000 miles in 1000 hours, in which case, though occupying more than one day, there is no doubt that the stakes, if of an amount above that allowed by this statute, would be recoverable. I agree with Mr. Justice *Blackstone* in his construction of the statute in *Bones v. Booth* (a), who says, "to lose 10*l.* at one time, is to lose it by a single stake or bet; at one sitting is to lose it in a course of play, when the company never part, though the person may not be actually gaming the whole time."

VAUGHAN B.—This question turns not on the legality of the game, or the contrary, but of the stake. The act was not intended to put down games harmless in themselves, though its words are sufficiently large to embrace all pastimes, but to prevent the loss of 10*l.* or more at one time or sitting. We find from *Strutt's English Pastimes*, that the game of tennis, mentioned in this act, occasioned profuse expenditure by *Henry 8.*, in

(a) 2 Bla. R. 1276.

the sums expended on the balls and other necessary articles, as well as in the extravagant sums staked on each game, while cricket appears to have been hardly known, at least by that name, till the beginning of the last century. The first section of the act only applies to the avoiding securities given to cover a sum lost at play, but the second embraces all games where the party loses by play or betting 10*l.* at one time or sitting. The fifth section only applies to cases where the winners of any sum have been guilty of fraud and cheating. Next, the question arises whether the action for money had and received can be maintained, and *Robinson v. Mearns* (a), and *Bate v. Cartwright* (b), show it may, if the money be demanded before the stakeholder pays it over. In the former case *Holroyd J.* says, the right of the party to recover back a deposit does not depend on whether the wager be illegal and void, or whether it be won or lost, but upon this, whether the stakeholder has received it on an illegal consideration; for if he has, he is bound to refund it, as the winner could not legally receive it. It may be stopped in transitu before the transaction is consummated by paying it over to him.

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BOLLAND B.—Had this action been brought, not by one of the parties laying the wager against the stakeholder, but by the winner against the loser, I should have agreed with the arguments urged for the present defendant, but I am of opinion that this action may be maintained. The question who won the game was not raised before the learned chief justice, nor needs it to be decided here.

GURNEY B. concurred.

Rule absolute to enter a verdict for 20*l.*

(a) 6 D. & R. 26.

(b) 7 Pri. 540.

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WILSON *against* TUCKER.

Where a general demurrer was delivered for delay just before the end of term, the court granted a concilium on the last day of term, and gave judgment for the plaintiff at the rising of the court, refusing to let defendant in to plead.

THE time for pleading being out, the defendant, on the evening before the last day of term, delivered a general demurrer, obviously to gain time; but the court, on motion on the last day of the term by *Butt*, granted a rule for a concilium, to be drawn up for the rising of the court; and refused *Cowling's* motion to suffer it to be withdrawn, and to be let in to plead.

Judgment for the plaintiff (a).

(a) See now Reg. Gen. H. T. 4 W. 4. No. 6; Jervis's Rules, 3d edit. 88.

REX in aid of *HOLLIS against* BINGHAM.

A crown debtor had issued an extent in aid against his debtor, who was afterwards discharged under an insolvent act. The crown debtor subsequently satisfied the crown its debt, and sued out a scire facias against the insolvent on the extent in aid. Held, that as no debt to the crown existed, he could not pursue his proceedings on the extent in aid.

IN *Easter* term *Follett* for defendant obtained a rule, calling on *Hollis* to show cause why the *scire facias* issued by him against the defendant, on a certain extent in aid against him, should not be quashed, and why he should not pay the defendant as well his costs occasioned by such *scire facias*, and the costs of the rule, as the costs of all proceedings instituted by *Hollis*, under the extent in aid, since 1825.

*Manning* for *Hollis* showed cause. The facts are, that *Hollis*, a distributor of stamps for *Hants*, being security to the crown for *Bingham*, an extent in chief issued against *Hollis*, who issued an extent in aid against *Bingham* in 1817. *Bingham* was discharged under the insolvent debtors' act in 1822 (b). It is sufficient that *Hollis* was indebted to the crown at the time the extent in aid issued. If this rule can be supported on the ground that *Hollis* having, in 1825, paid

(b) See this case Vol. I. 262; Vol. II. 46.

off his debt to the crown, occasioned by *Bingham's* default, has no right to reimburse himself by sci. fa. on the extent, he is remediless. *Rex v. Clarke* (a) shows, that though the crown debt be satisfied, this court will not always deprive the crown debtor of the benefit of crown process for his reimbursement. But the cancelling *Hollis's* bond is not sufficient to destroy his debt to the crown without a quietus. He also cited *Attorney General v. Stonehouse* (b).

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*Follett* contra. The crown is no party to this proceeding, *Hollis* having ceased to be a crown debtor. Then *Bingham* is protected by his discharge under the insolvent act in 1822. That was the decision of this court in a previous stage of this case (c).

BAYLEY B.—The question arising on this application was in substance disposed of by the court on the former motion, in 2 *Tyrwhitt's* Reports, 46. The court there decided no more than they were called on to do, viz., that the crown could have no claim on *Hollis*, and therefore that *Hollis* could have no claim to prerogative process against *Bingham*. The consequence of the discharge of *Bingham* under the insolvent act, as between himself and *Hollis*, was, that as a subject *Hollis* could have no claim against *Bingham* for that debt; but *Hollis* having previously obtained prerogative process against him, contends, that though he cannot proceed in his private character, yet that standing in jure coronæ he may enforce payment. That might be so between the crown and *Bingham*, but if the crown's debt is discharged aliunde, so that it has no longer occasion for the money from *Bingham*, it would be unjust to hold that *Hollis* is entitled to

(a) Bunbury, 22.

(b) Hardres, 229.

(c) See Vol. II. 46.

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prerogative process to enforce payment of a debt which no longer exists as between him and the crown, and which, if once due to him in his private capacity, was discharged by the operation of the insolvent act. In this case circumstances have arisen, which, as between the original creditor and debtor, would bar the claim of the former; while, as between the crown and the subject, the crown, though originally interested, has ceased to be so; then can this court suffer a man, who having been a crown debtor has ceased to be so, to defeat the operation of the insolvent act as between the parties, by putting in motion prerogative process on an extent in aid? *Hollis* therefore acted on his peril, and the sci. fa. must be quashed with costs thereof to be paid by him, but we ought not to give the other costs.

VAUGHAN B. concurred.

BOLLAND B.—This case was substantially decided on the last occasion. The declaration of the court in the case cited from *Bunbury*, was made at the request of the attorney general.

GURNEY B. concurred.

Rule absolute.

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THOMAS DARKER *against* FRANCIS DARKER, JOHN LOMAS DARKER, in the will called JOHN DARKER, ALICE DARKER, (since deceased,) MARY ANN DARKER, and EMMA DARKER.

THE defendants in this suit having petitioned the lord chief baron on the equity side of the court, his lordship desired it might be argued before the full court.

The petition stated that *William Darker* the testator duly made and published his last will and testament in writing, executed as by law required for the passing of real estates by devise, in the words and figures following; that is to say, "*Nottingham, 8th M. 5th, 1818, I give all my leasehold mortgages and freehold estates, goods, ready money, chattels, where-soever and whatsoever, to my brother Thomas Darker, in trust for my nephew and nieces John Darker, Alice Darker, Mary Ann Darker, and Emma Darker, when the youngest shall come of age; also if my brother Thomas Darker should have children, then his children to have equal share with my four before-mentioned nephews and nieces, he, my brother Thomas Darker, to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at, and living at free cost in the house I now occupy, keeping Sarah my servant, if they can agree, if not, to give her one shilling per week for life.*" The petitioners were now all of age, but *Sarah*, the servant

The words of a will were these; "I give all my personal leasehold mortgages and freehold estates, goods, ready money, chattels, wheresoever and whatsoever, to my brother T. D., in trust for my nephew and nieces J. D., A. D., M. A. D., and Emmy D., when the younger (*Emmy*) shall come of age: Also if my brother T. D. should have children, then his children to have equal share with my four before-mentioned nephews and nieces; he my brother T. D. to pay

for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at, and he living at free cost in the house I now occupy, keeping Sarah my servant, if they can agree, and if not, to give her one shilling a-week for life." Held, that under these words the nephew and nieces named by the testator were entitled to the rents and profits of his estate when the younger, *Emmy*, came of age, subject to the right of any child or children born to T. D., to share equally with them in the rents and profits accruing after the time of his, her, or their births, and to be educated and maintained under the clause in the will: Held also, that the testator did not mean the house to be given up by T. D. when *Emmy* attained 21.

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mentioned in the will, died before the youngest child became 21. The petition prayed that the plaintiff might be ordered to deliver up to *S. R.*, for the benefit of the petitioners, possession of the house and premises so given by the said testator to the said plaintiff to live in during the minorities of your petitioners, and which he unjustly withholds. And also that the said plaintiff may be ordered to deliver over to *S. R.* the title deeds and writings relating to the said house and premises, and all other title deeds and writings relating to the said testator's estate.

*Jervis* and *Parker* for the petitioners. The children took a vested interest at the testator's death in the property which was to be divided when the youngest came of age. [Lord *Lyndhurst* C. B. It could not be so divided to the exclusion of any child of *Thomas Darker*.] The trust was subject to payment for maintenance and educating of the testator's nephews and nieces named in the will, as well as of any children of *Thomas Darker*, as also to the keeping or allowing a sum to the servant *Sarah* for life. The plaintiff has not been called on to perform either. Though a class, viz., "nephew and nieces" is mentioned, the persons are here named in the will (a). The trust ended on the youngest child attaining 21. [Bayley B. Though the servant *Sarah* was then dead, there were future and fluctuating objects of the trust (b). How could the weekly allowance have been paid to *Sarah* without an estate in the trustee, *Thomas Darker*?] *Thomas Darker's* living free of cost was only to continue during minority, for the necessity for education and maintenance of the petitioners would cease on their all attaining full age. [Lord *Lyndhurst* C. B. The trust as to the servant would have remained had she survived that event.]

(a) See as to this point, *Crome v. Odell*, Ball and Beatty, 459, 463; 3 Dow. Parl. Rep. 61, S. C.

(b) See *ante*, 69, note (c).

*Wigram* for *Thomas Darker*. Those parts of this will in which the testator has expressed his intention in ambiguous terms, may be explained by other parts as to which there is no doubt. In the first place, it is clear that two families were objects of the testator's bounty, as well those not *in esse* but which might become so, as those *in esse* and named. The testator's next object was the securing the education of *Thomas Darker's* family, if he has any, as well as the petitioners. The words "if any is wanted" show the meaning to be, if *Thomas Darker* should not be able to maintain them himself. At all events his children cannot be excluded from the benefit of this provision. [Lord *Lyndhurst* C. B. If it applies to all the children of one brother *in esse* as well as of the other not *in esse*, the trust, with its consequences of the plaintiff's right to the house &c., must be continued, until it be certain whether *Thomas Darker* will have children or not.] The question being what the testator contemplated, it is immaterial that in the event the servant died before the last minority ended. But as it is clear that the servant was to receive benefit for life, the trustee took an interest in the property co-extensive with that intended burden. Then how can he live in the house at free cost without having an interest in the estate so as to pay the expense of so doing?

*Jervis* in reply. The real question is, whether the petitioners are entitled to the rents and profits of the house. [Lord *Lyndhurst* C. B. The words "his children" viz., (children of *Thomas Darker*,) are properly the last antecedent to the words "their education and maintain them." *Thomas Darker* may have no means of his own to maintain them, and power is given to do so out of the income of this property. If it includes his children, what follows?] He having no children when the nephew and nieces named in the

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will attained majority, could not retain possession, but was put to his right to resume on having children. [*Bayley* B. Can he not retain it while a possibility of his having children remains? The argument that he must quit possession on account of having no child at the expiration of the last minority, would lead to this consequence, that if he had a child he might resume, and if the child died he must quit again, till the birth of another, when he might again take possession. If all the nephews and nieces had died before the majority of the youngest, would the heir at law have been entitled to enter? One purpose of the will is, the maintenance in the particular house named of the children of the brother, as well as his own.] The heir at law might have entered, subject to re-entry by *Thomas Darker*, in the event of a child being born to him. He is not required to maintain the petitioners after their majority. [*Vaughan* B. Suppose the servant *Sarah* to have survived the last minority, how could the will have been performed if the trustee had not taken a longer interest than for the minority?] He may be entitled to the possession of the house, and yet be bound to pay rent to the receiver.

*Cur. adv. vult.*

Lord LYNTHURST C. B. afterwards delivered the judgment of the court.—Under this devise, the nephew and nieces of the testator who are named in the will, were entitled to the possession of the rents and profits of the estates when *Emmy* came of age, but in the event of any child being born to *Thomas Darker*, such child or children, if more than one, will be entitled to share equally with the other nephews and nieces in the future rents and profits from the time of their respective births. To such child or children the provision as to education and maintenance would also

apply, as well as to the nephews and nieces named in the will. We think, therefore, that it was not the intention of the testator that his brother *Thomas Darker* should give up the house upon *Emmy's* attaining the age of 21. This is further confirmed by the provisions relating to the servant. It is obvious that the testator intended the service to be in the house in question, and considered that it might endure for the life of *Sarah*. He could not therefore look to the time when *Emmy* should come of age as the period when the house was to be relinquished by his brother. The prayer of the petition must therefore be

Refused.

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ROBERTS *against* BARKER.

**A**SSUMPSIT by tenant against landlord. A special count for the amount of valuation of work and labour, tillage done, and manure bargained and sold under the custom of the country. Plea, non-assumpsit, with a set-off for rent, and use and occupation by the plaintiff. At the *Lent Yorkshire* assizes, held before *Alderson, J.*, the following facts were admitted. The plaintiff on the death of his father, about *Michaelmas* 1829, took to a farm held by him according to the terms of an expired lease for 21 years granted to him from 25th *March* 1795, and containing a condition that the tenant on quitting the farm should not sell or take away any manure then in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. The custom of the country

One of the covenants in an expired lease was, that the tenant on quitting the farm "should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant."

tenant was entitled to be paid for the manure left. Held, that as by the lease an express stipulation on the subject was made, the custom was excluded, and an outgoing tenant, who held under the terms of the lease, was not entitled to recover for the manure.

The custom of the country was similar, with this addition, that by it an outgoing

by the lease an



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bound the tenant to leave the manure in the fold, to be paid for by the landlord or incoming tenant. The plaintiff quitted the land at *Candlemas* 1832, and the homestead at *May-day*. Manure worth 33*l.* 12*s.* was left in the fold, and the tillages done on the farm were valued at 75*l.* For these sums the action was brought. The set-off was claimed for 75*l.* for half-a-year's rent up to *Lady-day* 1832. Credit was given to the plaintiff for rent paid to *Michaelmas* 1831, but a question was made whether the plaintiff having quitted as above was liable to pay the 75*l.* rent down to *Lady-day* 1832? The taking was originally a *Lady-day* taking, and the rent days at *Whitsuntide* and *Martinmas*, a fore-hand rent having been payable at *Whitsuntide* 1795; but on an addition made to the farm at *Michaelmas* 1813 the rent days appeared to have been altered to *Michaelmas* and *Lady-day*. The main question was, whether the outgoing tenant was bound by the lease to leave the manure in the fold without that payment for it to which, by the custom of the country above stated, he would have been entitled. The case was not left to the jury by express consent of the parties, and the plaintiff was nonsuited, with leave to move to enter a verdict for the value of the manure, if the court should hold him entitled to it; and for the other sum of 75*l.* if they should hold him not liable to pay rent to *Lady-day* 1832. In *Easter* term *John Williams* obtained a rule accordingly on the last point only, the court intimating that the taking being originally from *Lady-day*, the tenancy continued till *Lady-day* 1832, and half-a-year's rent accordingly then remained due (a).

*Pollock* and *Milner* for the defendant showed cause. As no distinct agreement is shown to the contrary, it

(a) See *Doe v. Spence*, 6 East, 120.

is clear that after the expiration of the lease, the plaintiff and his father held over according to its conditions, *Doe d. Rigge v. Bell* (a). Then *Webb v. Plummer* (b) applies to show that the terms of this lease excluded the custom of the country, and that the plaintiff was therefore bound to leave the manure on the premises without paying for it, according to the custom. The decision in *Senior v. Armytage* (c), therefore, does not apply. [Lord *Lyndhurst*. The stipulation relied on is partly couched in the same terms in which the custom of the country was stated; thus showing the intent of the parties to exclude the other part.]

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*John Williams* and *Heaton* for the plaintiff. The question at the trial was, Whether the stipulation in the lease destroyed the custom? It did not; for being silent as to the compensation to be paid for the manure, the custom of the country applies on that point, and after the first trial in *Senior v. Armytage* the court of King's Bench held, that unless the stipulation in express terms excluded the custom, it was still operative. The custom does not contradict the agreement in the lease, for both may co-exist. They also cited *Wiglesworth v. Dallison* (d).

The Court intimated that they should consult the learned judge who tried the cause as to the course taken at the trial, but expressed no doubt on the question argued.

LORD LYNDBURST C. B. afterwards said—The question as to the defendant's demand for rent was determined upon the motion for this rule. The only point

(a) 5 T. R. 471; and see 8 East, 168, and 4 Camp. 275.

(b) 2 B. & Ald. 747.

(c) Holt's N. P. C. 197.

(d) Doug. 201.

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remaining for consideration was the claim to the value of the manure left by the plaintiff upon his quitting the farm. It was admitted on the trial that the off-going tenant was bound by the custom of the country to leave the manure on the premises, and was entitled to be paid for it by the landlord or the succeeding tenant; but in this case the parties did not rely on the custom; on the contrary they made this a subject of express stipulation. The original lease contained a covenant that the tenant on quitting the farm should not sell or take away the manure which should be then in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. It is to be left for their use; and there is no provision as to any payment in respect of it. It was contended that the stipulation to leave the manure for the use of the lessors was not inconsistent with the tenants being paid for what was so left; that the custom to pay for the manure might be engrafted upon the engagement to leave it for the use of the lessors. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation; as by the custom the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part. We are of opinion, therefore, that the plaintiff was not entitled to be paid for the manure, and the rule must be discharged.

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PRITCHETT *against* BOEVEY, Bart. and six Others.

**TRESPASS** and false imprisonment against the sheriff of *Gloucestershire*, and six of his bailiffs. The first count for breaking and entering a close and dwelling-house of the plaintiff, and breaking a window therein. The second count stated, that the defendants arrested and detained the plaintiff in prison eleven weeks from 26 *April* to 11 *July* 1832, adding as damage, that by means of the premises the plaintiff had been forced and obliged to pay and had paid a large sum of money, to wit, 500*l.*, in and about his necessary maintenance, &c. during the said space of eleven weeks, while he was so imprisoned as aforesaid, and in and about the applying for and obtaining a legal discharge and release from the said imprisonment. Pleas, first, not guilty. Secondly, justification under a *capias ad respondendum*. Replication, admitting the existence of the writ, stated that the defendants unlawfully broke and entered the said dwelling-house, by breaking through a certain outer window of and belonging to the same, which was then and there shut, closed, and fastened, and that the said defendants did then and there by such forcible and unlawful breaking and entering of said dwelling-house, and by no other means soever, make the said supposed arrest in manner and form &c. At the trial before *J. Parke J.* at the last *Gloucestershire* assizes it

A rule having been obtained for discharging a party illegally arrested, was referred by the court to a judge at chambers, who ordered the applicant to be discharged, and offered to give him the costs of his application if he would undertake to bring no action for the arrest; but on his refusal, made no order about costs. An action of trespass and false imprisonment was afterwards brought, laying, *inter alia*, as damage, that the plaintiff had been obliged to pay, and had paid, a large sum of money in order to procure his discharge. There was

no distinct evidence of payment of the money by the plaintiff to his attorney:—Held, first, that the plaintiff was entitled to recover his costs as special damage in this form of action: but secondly, that as the declaration alleged actual payment of them by him, he could not recover that part which he had not paid, but so much only as had been advanced on his account, by his attorney, as for so much money paid by himself through an agent.

*Semble*, that had the count only alleged that the plaintiff had been forced and obliged, and become liable to pay damages for such liability to his attorney, he might have been recovered.

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appeared, that the plaintiff was arrested on *mesne* process, at suit of one *Parry*, in an illegal manner, the bailiffs having procured access to him in his house by first breaking through a piece of paper put over a broken pane of glass, and from thence unbolting or unlatching the outer door (*a*). The plaintiff obtained his discharge from *Gascoe J.* at chambers, to whom the rule, after being enlarged, had been referred by the court, and who would have ordered him the costs of the arrest and of his application for discharge, if he would have undertaken not to bring any action for the arrest; but that being refused, he was discharged without costs being mentioned in the order; and now sought to recover them in this action, in addition to the other damages; but there was no distinct evidence that he had paid his attorney his bill of costs for obtaining his discharge. The attorney swore the money had been secured to him. The rule, as originally granted, was not produced in evidence. The plaintiff had a verdict for 1*s.* on the first count, and for 25*l.* on the other counts, with leave to move to add the amount of the attorney's bill to the verdict. *Talford Serjt.* having obtained a rule accordingly,

*Ludlow Serjt.*, and *R. V. Richards*, showed cause. *Cash v. Wells* (*b*) shows, that where proceedings are irregular, and are set aside as such without costs, the judges cannot impose terms on the defendant of not bringing an action. *Loton v. Devereux* (*c*) shows the inconvenience of *Cash v. Wells*, and is in point for these defendants, unless the court shall hold that the court having expressed that judgment to be set aside "without costs," varies the cases. Now, the judge standing in the place of the court, might have given

(*a*) See *Lloyd v. Sandilands*, 8 Taunt. 250.

(*b*) 1 B. & Adol. 375.

(*c*) 3 B. & Adol. 343.

costs on this enlarged rule, and as the subject was moved before him, did he not in substance dispose of these costs on that motion? They also cited *Nightingale v. Devesme* (a), and *Mac Lachlan v. Evans* (b).

Secondly, the allegation in the second count, that the plaintiff has been forced and obliged to pay, is not borne out by the evidence, that the costs were secured.

*Talfourd* Serjt. and *Curwood* supported the rule. The question is, whether an order silent as to costs is to be taken as conclusive against the plaintiff's right to recover them by action? Now in *Loton v. Devereux* there was an express adjudication as to costs; whereas here, assuming that the judge had jurisdiction over them, and that they were prayed for by the rule (c) which was referred to him, he simply discharged the rule without doing any thing to preclude the plaintiff from recovering his costs. He said, in effect, "I will not determine as to costs, but if you will bring an action for them, I cannot prevent you;" and though *Loton v. Devereux* is an authority the other way, it may be doubted whether a judge on a summary application has power to preclude the plaintiff from recovering his costs in an action. In that case, too, the plaintiff would have proved sufficient by showing the goods to have been seized. Then the costs of setting aside the judgment did not directly arise from the act of the party, but from matter collateral to the plaintiff's complaint. The plaintiff's application for discharge tended to exonerate the sheriff, by diminishing the damage suffered in the detention.

The second point was not taken at the trial. However, as between the plaintiff and his own agent, the evidence of plaintiff's liability to him was sufficient. In

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(a) 5 Burr. 2589; 2 Bla. R. 684. S. C.

(b) 1 Y. &amp; J. 381.

(c) The rule did in fact pray costs of the application.

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*Barclay v. Gooch* (a) Lord *Kenyon* held, that if a party gives a promissory note for the debt of another, which the creditor accepts in payment as money, it is as a payment of money to the party's use, and may be recovered as such. *Leery v. Goodson* (b), *Mac Lachlan v. Evans*, *Wharton v. Walker* (c), were cases where no money had passed, but the interests of third persons came in question, and the payment of the money being the actual and primary cause of action, it was material to prove it.

BAYLEY B.—The first question is, Whether these defendants are liable to pay the costs incurred by the plaintiff in procuring his discharge from an illegal arrest; and the second, whether, if they are, the plaintiff is entitled upon this declaration to add them to the damages recovered in the action? On the first point *Loton v. Devereux* (d) was relied on as an authority, to show that though the plaintiff necessarily incurs costs in setting aside proceedings for irregularity, he is precluded from recovering them by action; but it is plainly distinguishable from the present, in being a motion to set aside a judgment and execution levied against the defendant's goods, on a nice question of irregularity, in which the court held the proceedings irregular, and made the rule absolute; but added "without costs." Then they expressly adjudicated on the question whether the costs should be allowed or not, and made it part of the order for making the rule absolute. In this case my brother *Guselee* did not adjudicate on the subject of costs, but discharged the plaintiff without more. It, therefore, seems to me that the jury had a right to take those costs into their consideration, as

(a) 2 Esp. 571; but see *Taylor v. Higgins*, 3 East, 171; *Marwell v. Jamison*, 2 B. & Ald. 54, and 10 B. & Cr. 346.

(b) 4 T. R. 687. (c) 4 B. & Cr. 163. (d) 3 B. & Adol. 343.

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arising to the plaintiff from the improper arrest, and that the plaintiff would be entitled to have the rule for adding them to the verdict made absolute, had the evidence supported the plaintiff's averment in his declaration, that he was forced to pay a large sum of money in and about the applying for and obtaining his discharge. Upon that point a second objection was raised on behalf of the defendants, viz. that the declaration should have only stated that the plaintiff incurred great expense, and was forced and obliged and became liable to pay those costs. Now, the evidence was not that he had paid the costs to his attorney, but that he was liable to pay them to him. Then the plaintiff has not paid his attorney the sum he now seeks to recover. There is only a debt due from him which he may be hereafter obliged to pay, and which is liable to all those accidents of the plaintiff's discharge under the insolvent or bankrupt laws which would bar the remedy for it against the plaintiff. Then it would be unreasonable that the plaintiff should be held entitled to recover, as paid, that debt which he has perhaps never been called on to pay, has never paid, and may never pay. The bill of costs of 10*l.* included money advanced for the plaintiff by his attorney as well as charges for work and labour and fees. The latter part cannot be recovered under this form of declaration. But as to that sum which the attorney as agent to the plaintiff has advanced on his account, and for his use, the plaintiff is in the same situation as if he had borrowed it from him to pay over. Therefore, as to so much of the bill as consists of money paid by the attorney to procure the plaintiff's discharge, it is money which the plaintiff may be considered to have been forced and obliged to pay, and he is entitled to recover for so much. Let it be referred to the master to ascertain that sum accordingly, and to add it to the verdict.



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VAUGHAN B.—It was intended to invest the judge at chambers with the same power as the court in disposing of the costs; but he did not adjudicate on them, which distinguishes this case from *Loton v. Devereux*. On the other point, the allegation of payment is material, and is not satisfied without proof of actual payment.

BOLLAND and GURNEY Bs. concurred.

Rule absolute, for adding to the verdict on the second count so much of the bill of costs as the master should find to have been paid out of pocket by the attorney, and discharged as to the rest.

JUDSON *against* ETHERIDGE.

A person to whom a horse is delivered to be stabled, taken care of, fed and kept, has no lien on him for the expense incurred in so doing.

**D**ETINUE for a gelding. Plea, first, non-detinet. Secondly, that the said gelding, in the said declaration mentioned, was, on &c. in &c., delivered by the plaintiff to the defendant to be stabled and taken care of, and fed and kept by the defendant for the plaintiff for remuneration and reward to be paid by the plaintiff to the defendant in that behalf. And the defendant in fact further saith, that afterwards and before and at the time of the commencement of this action, to wit, on 16th *March* 1833, in &c., the plaintiff became and was indebted to the defendant in a large sum of money, to wit, the sum of ten pounds, being a reasonable and fair remuneration and reward in that behalf, for and in respect of the defendant having before then stabled and taken care of, and fed and kept the said gelding for the plaintiff, under and by virtue of the said de-

livery and bailment. And the defendant in fact further saith, that the said sum of ten pounds is still due and owing to the defendant, and for which reason he the defendant hath, from the time of the delivery of the said gelding, hitherto detained, and still detains the same, as he lawfully may, for the cause aforesaid. Verification. Similiter and general demurrer and joinder.

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*Mansel* for the plaintiff supported the demurrer. This plea is bad, as it states a mere bailment of the gelding to be stabled, taken care of, fed and kept, without setting forth that the defendant keeps an inn, or even a livery-stable, or that there was any express contract for a lien. *Wallace v. Woodgate* (a) shows that a livery-stable keeper has no lien on a horse for his keep, except by special agreement, a doctrine before held by *Holt C. J.*, in *Yorke v. Greenaugh* (b), for the ground of lien, in the case of innkeepers and hostellers, was their obligation to receive guests and their horses in respect of their public employments. See *Bac. Abr. tit. Inns and Innkeepers* (C. 3.), *Watbroke v. Griffiths* (c), *Gelly v. Clarke* (d), *Thompson v. Lacey* (e).

The Court here called on

*Erle* to support the plea. The general principle now established is, that every workman who has bestowed labour, money, or money's worth on a chattel for reward by its owner, has a particular lien on it for that reward. It has been so held in the case of a packer, *Ex parte Deese* (f); a printer, *Blake v. Nicholson* (g); a ship-

(a) Ry. & M. 193.

(b) *Ld. Raym.* 868. See *Francis v. Wyatt*, 3 Burr. 1498; 1 Bls. R. 483, S. C.

(c) *Moore*, 877.

(d) *Id.* 878.

(e) 3 B. & Ald. 283.

(f) 1 Atk. 228.

(g) 3 M. & S. 167.

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wright, *Franklin v. Hosier* (a); the master of a ship, for passage-money, *Wolf v. Summers* (b); a miller, to whom corn was delivered on a contract to be ground for a specific price, *Chase v. Westmore* (c). That circumstance would, according to some of the old cases, have excluded the lien. [Lord *Lyndhurst* C. B. *Chapman v. Allen* (d) is an authority that where cattle are taken in to agist, agistor has no lien.] That case is not sanctioned to its full extent by Lord *Ellenborough* in *Chase v. Westmore*, which received very full consideration, and is incompatible with the old doctrine, that the right to lien depends on the party claiming it being compellable to receive the articles. Thus *Bevan v. Waters* (e) and *Jacobs v. Latour* (f) established the lien of the trainer on a racehorse, for the pains bestowed on him. [Lord *Lyndhurst* C. B. In *Bevan v. Waters* a trainer's lien was allowed at nisi prius by *Best* C. J., who took the distinction between him and a livery-stable keeper. He had previously held at nisi prius, in *Wallace v. Woodgate* (g), that a livery-stable keeper had not by law, and without special agreement, a lien on horses for their keep. Lord *Holt's* expressions to the same effect in *York v. Greenough* are not mere dicta, but must be considered as the point in the cause; for if the rest of the court had not entertained the same opinion as to that, why was the question discussed before them, whether the horse was left to agist merely, or by a person being at the time a guest in the inn?] Counsel, in arguing *Jacobs v. Latour*, seem to have understood that a livery-stable keeper had no lien, because from the nature of the bailment he must have the horse ready to be used by

(a) 4 B. &amp; A. 341.

(b) 2 Camp. 631.

(c) 5 M. &amp; S. 180.

(d) Cro. Car. 271.

(e) M. &amp; M. 235.

(f) 5 Bing. 130; 2 M. &amp; P. 201, S. C.

(g) Ry. &amp; M. 193.

the bailor from time to time, without being paid each time, whereas the contract with a trainer is different. Now this plea does not show the defendant to be a livery-stable keeper, but discloses that expense and labour were to be bestowed upon the horse.

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Lord LYNTHURST C. B.—This question turns on the sufficiency of the plea, which states that the horse was delivered by the plaintiff to the defendant to be stabled and taken care of, and fed and kept by the defendant for the plaintiff, for remuneration and reward to be paid by the plaintiff to the defendant in that behalf; and then, that the plaintiff became indebted to the defendant in the sum of 10*l.*, being a reasonable and fair remuneration and reward for and in respect of the defendant having stabled and taken care of and kept and fed the said horse, under and by virtue of the said delivery and bailment, and justifying the detention till that sum should be paid. The question which arises on the facts disclosed in the plea is,—Has the defendant a lien on the horse so delivered? and I am of opinion that he has not. This case is distinguishable from all those where a lien has been held to exist in favour of artificers and persons of skill, in respect of labour bestowed on the chattels bailed to them; and the decisions which are applicable seem all one way. In *Chapman v. Allen* it was held that an agistor of cattle had no lien on the cattle agisted. In *York v. Greenough* it was substantially decided by the whole court that a livery-stable keeper has no lien on a horse taken in to keep for the owner. The case of *Bevan v. Waters (a)*, when the plaintiff claimed a lien on a horse sent to him to train for running, confirms the former authorities, being distinguished by *Best C. J.*

(a) M. & M. 235.

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from the case of a livery-stable keeper on the ground that the plaintiff as a trainer had expended money, skill, and labour in altering the character of the horse, so as to put him into condition to run at races. *Jacobs v. Latour (a)*, decided in the previous term, is the same way.

VAUGHAN B. concurred, citing Lord *Ellenborough's* expressions as to growing liens in *Rushforth v. Hadfield (b)*.

BOLLAND B.—In deciding against this claim of lien, we do not break in on any of the decided cases. If a trainer has a lien on a racer, it must rest on his having made him quite a different animal by the improvement derived from his care and skill. In this case what was done by the defendant appears to have been merely stabling, feeding, and taking care of the horse.

GURNEY B. concurred.

Judgment for plaintiff on the second plea.

(a) 2 M. & P. 261.

(b) 7 East, 329.

END OF TRINITY TERM.

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*To the Reader.*

[It was thought desirable that the same volume in which *Trappes v. Harter* is reported, should also contain three other cases of fixtures which occurred in the Exchequer in Trinity term 1834. Those cases are therefore subjoined. The Reporter very much regrets that the pressure of matter has prevented his keeping even pace with the decisions of each term. Every Reporter must desire, even more than the readers of his compilations, that he should be able to report cases while fresh in his memory, and possessing the attraction of novelty. But while no labour of his, consistent with long endurance of it, has been spared, he has not succeeded in avoiding an arrear, for which he bespeaks the indulgence of a liberal profession, while he pledges himself to use every exertion to reduce it.]

1884.

*Hallen against Runder.*

**I**NDEBITATUS assumpsit, for "chattels, fixtures, and effects, then lying and being in and fastened to a certain dwelling-house and premises, bargained for and bought by the defendant of the said plaintiff, and sold by the plaintiff to the defendant at his special instance &c." for 40*l.* 10*s.* Second count, for the price and value of the goods, chattels, fixtures and effects, bargained and sold by plaintiff to defendant, and on an account stated. Plea, general issue.

At the trial before *Gurney B.* at the *Guildhall* sittings after *Michaelmas* term 1883, it appeared that the plaintiff had been tenant to the defendant of a house for several years before the 25th *March* 1883, when his lease expired, and he removed elsewhere. Two or three days before he quitted, the defendant called and requested plaintiff not to remove the fixtures, saying she would take them all at a fair valuation by two brokers. The plaintiff had originally paid about 20*l.* for the fixtures, but had added considerably to them since. He quitted possession of the house and fixtures on 25th *March*, and sent the key of the house to the defendant's son. On the 26th a broker went on behalf of the defendant to the house, and having met the plaintiff's broker, they valued the fixtures at 40*l.* 10*s.* and signed that appraisement at that sum. The key was fetched from the defendant's house on that occasion. On examination by the learned baron he said, that on the 25th *March* the defendant directed him to go to No. 17, *Nelson Square*, and look at some

A short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired, and the tenant having quitted possession of the premises without severing the fixtures sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.* and signed the valuation:—Held, that the plaintiff having at the defendant's request waived his right to remove the fixtures, the matter bargained for was not an interest in land within 29 *Car.* 2. c. 3. s. 4., and that the amount ascertained by the broker bargained and

might be recovered in indebitatus assumpsit for fixtures and effects sold, without proving a note &c. in writing.

*Semble*, that such note &c. in writing was not required under s. 17, respecting the "sale of goods" of 10*l.* value or upwards.

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fixtures and stoves there; that she said she did not know whether she would take to the fixtures or not, but that the witness was to appraise them. For the defendant it was objected, first, that *indebitatus assumpsit* was not maintainable for fixtures before severance; and secondly, that a contract in writing was at all events necessary by the statute of frauds, *29 Car. 2. c. 3. s. 17*. The learned baron told the jury, that if they thought the defendant had authorized the broker to appraise, he was of opinion she had given him authority to sign the appraisal, and that that was a sufficient note in writing if it was necessary. The jury found a verdict for the plaintiff for 40*l.* 10*s.*

In *Hilary* term 1834 *Kelly* moved for a nonsuit or new trial. First, *indebitatus assumpsit* was not maintainable for fixtures; and secondly, there was no contract in writing to bind the parties; for even if the valuation was such a contract, the evidence contradicts the broker's having any authority to sign it within *29 Car. 2. c. 3. s. 17*. The fixtures in *Lee v. Risdon (a)*, appear to have been only the common household fixtures. That case shows that the price of fixtures fastened to a house cannot be recovered under a declaration for "goods sold and delivered." [*Bayley* B. Did it appear there that the plaintiff was owner of the inheritance, or of a lesser interest? for if he was the former, the fixtures would be parcel of his freehold, so as not to be liable to be taken as goods and chattels under a *fieri facias* against the tenant (*b*). Here they have ceased to be the property of the reversioner, having been originally sold to the termor, with whom the defendant has bargained to take them at the end of his term.] *Lee v. Risdon* was decided on the point of pleading. [Lord *Lyndhurst* C. B. Both house and fixtures were there taken of the landlord, and not from

(a) 7 Taunt. 188.

(b) See cases collected *ante*, 618. n. (a).

the outgoing tenant. Then were they not parcel of the freehold at the time of the sale? *Bayley B. Risdon* undertook to purchase parcel of the freehold, which did not cease to be such till the purchase was completed; whereas here the plaintiff had bought the fixtures, and had a right to remove them as personalty during his term. [Lord *Lyndhurst C. B.* He had bought the fixtures, and having a right to remove them forbore to exercise it in consequence of the defendant's request. The key of the house was delivered to the defendant's son before the valuation, and it does not appear that she afterwards repudiated the possession.]

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The authority of *Lee v. Risdon* depends on the question, whether a severance of fixtures is effected by the sale of them by a landlord to a tenant, as a matter separate from the demised premises, after valuation made, and possession taken by the tenant, but before payment of the purchase money? If it is so effected, *Lee v. Risdon* could not be supported, it having decided that notwithstanding all those circumstances they remained part of the freehold, the purchase money not having been paid. [*Bayley B.* The severance was complete when the purchase was completed, and not before. Neither at the time of the sale, nor till the severance, were they goods sold.]

*Kelly* then urged, that the evidence did not show the broker's authority to do more than appraise.

The court refused a rule on the first point, Lord *Lyndhurst* citing *Pitt v. Shew* (a), and saying, that the defendant being in the situation of landlord of the premises, and having agreed during the term to purchase the tenant's fixtures, which accordingly remained on the premises, such a purchase might be made notwithstanding *Lee v. Risdon*, on the grounds of dis-

(a) 4 B. & Ald. 206.



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inction from that case pointed out by *Bayley* B. But they granted the rule for a new trial on the other point; *Bayley* B. adding, that it might be a question whether the defendant had not accepted the fixtures by not having given the plaintiff notice to take them away.

*Thesiger* and *Petersdorff* showed cause in *Trinity* term (a). The contract was, that in consideration that the plaintiff would not remove the fixtures during his term, the defendant would take them at a price to be subsequently fixed by the broker. The appraisement was merely a mode of ascertaining that price, and not a condition capable of defeating the contract by matter subsequent. Unless these goods are not treated as goods and chattels between the parties, the broker's authority to appraise must be taken to include an authority to complete the appraisement by signature for his principal. As far as possession of the house went the defendant had the fixtures, so that having procured the plaintiff's term with his right of removing them to pass away, she affirmed the contract to take them, subject to a valuation.

Having been called on by the court to argue whether the action was properly brought on an indebitatus assumpsit, they contended, that though the special contract not to remove the fixtures might have been incomplete till the price was ascertained, it became executed so as to let in the indebitatus count, as soon as that was ascertained by appraisement. *Poulter v. Kilngbeck* (b) is in point, where the plaintiff had verbally agreed with the defendant to let him land rent free, on condition of having a moiety of a crop. While it was on the ground it was appraised for both parties:—

(a) On the same day on which *Boydell v. M'Michael* was decided. See 974.

(b) 1 Bos. & Pul. 397.

Held, that the plaintiff might maintain indebitatus assumpsit for a moiety of the value, without stating the special agreement, that having been executed by the appraisement, and the action having arisen out of something collateral to it. In *Salmon v. Watson* (a), the agreement was verbal to take a house and purchase the fixtures at a valuation to be made by two brokers. The defendant having taken possession of the fixtures, and paid part of the sum, was held liable for the remainder on the account stated. Had there been no appraisement here, the plaintiff might have recovered on a quantum valebant, as the defendant has had the benefit of the fixtures; *Earl Falmouth v. Thomas* (b). A count for lands bargained and sold has been usual in practice, where possession of the land has been given.

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[*Purke* B. In that case a legal conveyance, passing the land to the defendant, must be shown, and the mere act of taking possession would not be sufficient to support the indebitatus count. Therefore that count, in point of practice, seldom occurs; for as there must be a conveyance to pass the interest, that would in general recite the payment of the purchase money, and contain a release for it.]

The test to try whether indebitatus assumpsit is or is not the proper form of action is, whether the contract is executed or not? The acceptance of the key confirmed the contract.

*Kelly* supported the rule. The valuation signed by the broker is not a sufficient memorandum in writing of the bargain to bind the parties within 29 Car. 2. c. 3. s. 17., for the broker's evidence contradicts the presumption of general agency, by proving that his

(a) 4 B. Moore, 73.

(b) *Ante*, 26.

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authority extended to the utmost to appraising the fixtures.

[*Alderson B.* Has the statute of frauds any application? *Parke B.* The general rule is, that chattels, by being affixed to the freehold, become parcel thereof, subject to the right of the tenant, if he purchased or originally affixed them, to remove them altogether, or part with them before the end of the term to any incoming tenant; as well as to the liability of their being seized under a fieri facias against the tenant during the term. Here, the defendant as landlord would have taken the fixtures as part of the freehold, had they not been removed before the end of the tenancy; the agreement conferred on her no interest to take effect in possession before that time; but the plaintiff, the tenant, waived his right to sever them during the term. That has nothing to do with an interest in land, but the question is, whether a special count was not necessary to enforce such a contract of waiver.]

In *Lee v. Risdon (a)*, *Gibbs C. J.* treats the household fixtures there described as parcel of the freehold till severed. *Horn v. Baker (b)* is to the same effect.

The plaintiff, however, can only recover on this declaration, on the ground that these fixtures, by severance from the freehold, become subjects of sale and delivery within 29 Car. 2. c. 3. s. 17. or they fall within section four of that act, as part of the freehold, a note in writing was in this case required. Now, whatever right the tenant has to part with fixtures during his term a special count was required, for the mere contract did not vest them immediately and indefeasibly in the defendant, as the sale and delivery of goods would have done. [*Parke B.* He might sever them within the term, but if left after it ended, they became the landlord's property, *Lyde v. Russell (c).*]

(a) 7 Taunt. 188.

(b) 9 East, 215.

(c) 1 B. & Ad. 394

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Suppose the case of furniture let with a house, could an indebitatus count be supported for the use of it? However, if this count can be sustained, these articles are within section 17 of 29 Car. 2. c. 3. Now the judge told the jury that if they thought the defendant had given authority to appraise, viz. to ascertain the amount of money to be paid to the plaintiff, that included her authority to sign the appraisement made. But without arguing whether a valuation may of itself be a contract of purchase or not, unless there be a sufficient contract in writing, it is as if there was *no* such contract. [Parke B. You say that if it had been no more than a valuation, authority was given to sign it as such, specifying the value only; and that the broker had not authority to sign a valuation, which would of itself be a contract to purchase. However, the question turns on the form of action.]

As the defendant was reversioner, the taking the key worked no acceptance.

*Cur. adv. vult.*

PARKE B. afterwards delivered the judgment of the court.—In this case, which was argued before my brothers *Bolland, Alderson, Gurney*, and myself, on *Saturday* last, all the questions were disposed of by the court in the course of the argument, except one, namely, whether the plaintiff could recover the amount of the valuation of the fixtures upon any count in this declaration.

The count stated, that the defendant was indebted to the plaintiff in 50*l.* for the price and value of goods, chattels, fixtures and effects, bargained and sold by the plaintiff to the defendant at his request; and in the like sum for the price and value of other goods, chattels, fixtures and effects sold and delivered by the plaintiff to the defendant at his request; and in the like sum upon an account stated; and the question

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is, whether these counts or any part of them be applicable to the plaintiff's case. We think that either the first count, or that part of the second count which charges the defendant with the price and value of fixtures bargained and sold, or indeed that which states him to be indebted for fixtures sold and delivered, is, upon the evidence, supported; and it is unnecessary to say, whether the other part of the second, upon the account stated, was or was not sustained.

The situation of the plaintiff was this: upon entering as tenant to the defendant he had paid upwards of 20*l.* for the interest which a former tenant had in certain chattels which had been annexed to the freehold, but which that tenant had a right to sever and remove whenever he pleased, during his term; and the plaintiff had also during his term annexed other chattels to the freehold, which also he had the like right of removing. Shortly before the expiration of this term the plaintiff agreed with the defendant, his lessor, that he should forbear to remove all these chattels so annexed, which he was about to do, and that they should be taken by the defendant on a valuation to be made by two appraisers. This value was ascertained by two brokers, both of whom must, upon the finding of the jury, be taken to have been properly appointed for this purpose, and fixed at 40*l.* 10*s.* The plaintiff left the chattels attached to the freehold, and the defendant took possession of them.

When chattels are thus fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus to convert them into goods and chattels, as stated by Lord C. J. Gibbs in *Lee v. Risdon*, 7 Taunt. 191, 2 Marsh. 495, S. C., and the very able work of Messrs.

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*Amos and Ferard on Fixtures*; but whilst annexed they may be treated for some purposes as chattels; for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels, *Poole's case (a)*, in like manner as growing crops of corn or other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. The case above cited, however, decides that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt v. Shew (b)*, they were held to fall under the description of "goods, chattels and effects" in an action of trespass, we cannot consider that previous authority overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Lord C. J. *Abbott* certainly does not mention that circumstance as the ground of the decision.

The plaintiff cannot, therefore, recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot so recover as for *fixtures* bargained and sold or sold and delivered.

The real nature of the contract between the plaintiff and defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels; and after the contract is executed and the plaintiff has given up the possession to the defendant, the question is, whether he may not declare as for *fixtures* bargained and sold or sold and delivered. The term "*fixtures*" has now acquired the peculiar meaning of personal chattels, which have been annexed to the freehold, but which are removable at the will of the person who has annexed them; in this sense it is used in the *Treatise on Fixtures* above referred to,

(a) 1 Salk. 368.

(b) 4 B. & Ald. 206.

HALLAM  
v.  
RUNDER.  
(Trib. 1834.)

and it has certainly been the practice since the decision in *Lee v. Risdon* to declare for the amount of the valuations of such fixtures between one tenant and another, or between the tenant and landlord in a count on *indebitatus assumpsit* for fixtures. Although this may not be the most accurate mode of describing the real contract between the parties, we think it is sufficient, and that the plaintiff may recover upon it; and the case bears a strong analogy to that of a contract by a tenant to give up to his landlord or successor the growing crops to which he is entitled by common law, or the custom of the country, as emblements; the value of which, after the contract is executed, may certainly be recovered on a count for crops bargained and sold. See *Mayfield v. Wadsley* (a).

This question, on the form of the declaration, was decided by the court on the motion for a rule nisi; but as it was suggested by the learned counsel for the defendant that the court so decided under the impression that this was a sale of an interest in the land within the fourth section of the statute of frauds, leaving the point to be discussed whether the appraisement was a sufficient memorandum in writing, we have allowed the point to be argued, and having given it full consideration, have decided it. We are quite satisfied that this is not a case of interest in land, for the reasons given in the course of the arguments. And the judgment of all the court, and particularly that of Mr. Justice *Littledale* in *Evans v. Roberts* (b), upon the subject of growing crops, is an authority to the same effect; but treating this as not being a sale of any interest in land, we think the declaration is sufficiently adapted to the case.

Rule discharged.

(a) 3 B. & C. 357.

(b) 5 B. & C. 829.

1834.

**TWIGG against POTTS and Others (a).**

**TRESPASS.** First count for breaking and entering plaintiff's house, and seizing and taking divers goods, chattels and effects enumerated, and converting and disposing thereof to their own use. Second count for an expulsion. Third, for taking and distraining other goods, and impounding same. Fourth, for carrying away and converting goods, chattels and effects. Fifth, for breaking, entering, tearing away, severing, seizing and taking away divers enumerated (b) fixtures and effects of the plaintiff and converting &c. the same.

Pleas; first, general issue; second, to the first count, that plaintiff held and enjoyed the premises in which &c. as tenant to *Potts* at 5*l.* yearly rent; that *Potts* and the other defendants distrained the said *goods and chattels* in the said first count mentioned, for 65*l.*, being 13 years arrears of rent. Third plea to first count, that plaintiff held and enjoyed the premises in which &c. as tenant to *Potts*, at 2*l.* 10*s.* per annum, and that defendants distrained on the *goods and chattels* in that count mentioned for 32*l.* 10*s.*, being 13 years rent.

Replications, similiter to first plea, and to second and third pleas, that plaintiff did not hold &c. in manner and form as therein alleged.

At the trial at the *Lent Staffordshire* assizes 1834,

(a) See notice prefixed to *Hallen v. Runder*, 958.

(b) Viz. Blacksmith's bellows, anvils and blocks, vices, lathes, shelves, grates, grindstones and benches.

In trespass one count was for taking away "goods, chattels, and effects," and another for tearing away and severing "fixtures and effects." The pleas were the general issue, and two special pleas to the first count, stating the tenancy of the plaintiff to one of the defendants at a certain rent, which being in arrear, they distrained the "goods and chattels" in that count mentioned. Replication, similiter to first plea, and non tenuit to the other two. The jury found the tenancy to exist as thirdly pleaded:—Held, that on the issue taken in the replication the trespasses laid in the first count were after verdict covered by that special plea, though some of the articles taken were fixtures.

*Semble*, the plaintiff might have demurred to the special pleas.

Held, that the plaintiff was entitled to recover for the damage done to his house by severing his fixtures from it, but not for the value of them.



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v.  
*Potts*  
and Others.  
(Trin. 1834.)

before *A. Park J.* it appeared, that the plaintiff being tenant to *Potts* was in arrear to him for thirteen years rent at *2l. 10s. per annum*. As he kept his premises fastened on week days, *Potts* and his servants distrained and severed his fixtures, as well as moveables, on a *Sunday*. They were removed the next day, and afterwards sold. The holding by the plaintiff having been established as stated in the third plea, the plaintiff then relied on the fifth count for pulling down the fixtures, and to which count only the general issue applied. The learned judge was of opinion that the severance there laid was not a distinct trespass, but that the whole grievance complained of was one trespass, sufficiently stated in the first count and substantially covered by the third plea. The jury, however, in the third plea, found the tenancy to exist as laid, but gave a verdict for the plaintiff, damages one farthing, and the learned judge certified to deprive him of costs.

In *Easter* term, *Jervis* for the plaintiff moved for a new trial, on the ground that the severance of the fixtures laid in the fifth count was not covered by the third plea, which though pleaded generally to the first count only, justified the taking the "goods and chattels" mentioned in that count, and that the jury were not directed to give damages for the severance laid in the fifth count.

[Lord *Lyndhurst* C. B. The issue was only that the plaintiff did not hold on the terms stated; but the jury found that he did. The third plea covered all the trespasses in the first count, and was found for the defendant: while on the general issue, as applicable to the fifth count, the plaintiff had a verdict with nominal damages, though had the jury followed the direction of the judge, the verdict would have been for the

defendant; and *Pitt v. Shew* (a) shows, that the word "effects" may comprehend fixtures.

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(Trin. 1834.)

The Court (Lord *Lyndhurst* C. B., *Vaughan*, *Bolland*, and *Gurney* Bs.) granted a rule, in order to consider the effect of the pleadings.

*R. V. Richards* and *W. J. Alexander* showed cause in *Trinity* term. The only question in issue on these pleadings is, whether there was a tenancy or not? Then the tenancy having been established as laid in the third plea, *Pitt v. Shew* applies to show that the taking the fixtures might be recovered under the word "effects" in the first count, from which it appears that that count embraced the whole subject-matter of complaint, including the severance of the fixtures, and is in effect justified by the third plea.

The Court (*Parke*, *Bolland*, *Alderson*, and *Gurney* Bs.) then called on

*Whateley* (*Jervis* with him) to support the rule. The plea relied on does not justify taking effects, but goods and chattels only. Besides, the fifth count is for a distinct injury to the plaintiff in removing his fixtures, and he may recover the value of them as fixed. The defendants are in the same situation as if they had pleaded the general issue only in pursuance of 11 *Geo. 2. c. 19. s. 21.*; for the act of severing the fixtures is not justified. The finding of the jury on the third plea, that a tenancy existed as there alleged, places the plaintiff in the situation of a *nolle prosequi* having been entered as to the first count, which will

(a) 4 B. & Ald. 206. See *Doe v. Dring*, 2 M. & Sel. 450; *Hogan v. Jackson*, Cowp. 304.

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not deprive him of insisting on proof of a distinct trespass not covered by that plea, *Hayward v. Kain* (a).

PARKE B.—It is quite clear that we ought not to grant a new trial. The trespass laid in the first count, viz. the taking away the chattels or effects, was covered by the third plea to that count, though some of them were fixtures. *Pitt v. Shew* is an authority to show that as the plaintiff might recover in that form of action for taking fixtures under the words “goods, chattels, and effects,” so the taking them might have been justified under the general issue. But both the special pleas are pleaded by way of justification of the whole cause of complaint stated in the first count, under a distress for rent, though in a subsequent part of each they are applied only to taking away the goods and chattels in that count mentioned (b). If the plaintiff, instead of demurring (c), meant to rely on part of the things distrained having been fixed to the freehold, he should have replied, that as to part of the effects in the first count mentioned, they were fixed to the freehold at the time of the distress, and could not therefore be lawfully taken away, and should have confined his replication of non tenuit to the moveable chattels (d). As it now stands, the third special plea, as affirmed by the jury, is, after verdict, a good answer to the first count.

The question of misdirection on the fifth count is, whether the plaintiff could recover for the damage

(a) 1 Mood. & Malk. 311.

(b) See *Monprivat v. Smith*, 2 Camp. 25, cited by *Gaselee, J.* in *Stammers v. Yearsley*, 10 Bing. 39.

(c) See 1 Saund. 28, notis : and *ante*, 279.

(d) See *Niblet v. Smith*, 4 T. R. 504. He did not discontinue the action by replying to a plea which, though purporting to answer the whole declaration, only answered part, and might therefore have been demurred to; *Everard v. Paterson*, 6 Taunt. 645.

done to his house by the act of severing the fixtures from it. I am of opinion that he was entitled to recover for that act, but not for the value of the fixtures so severed. In point of law the judge should have left to the jury what damages were sustained by the simple act of pulling them down. But the jury have set that omission right by finding a verdict for the plaintiff for some damages, though estimated at a low rate. They thought the plaintiff's whole grievance was satisfied by a farthing, so that the miscarriage in not leaving the breaking down the fixtures to them has become immaterial, and the plaintiff is not now in a situation to press for a new trial, by complaining of the verdict as wrong, its amount being under 20*l.* (a).

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(Trin. 1834.)

The question as to the legality of a distress for rent on a Sunday is not raised on their pleadings (b).

BOLLAND B. concurred.

ALDERSON B.—The jury differed from the judge, and thought the defendant's act in pulling down the fixtures not warranted; but at the same time it was considered not to merit more than one farthing damages.

GURNEY B. concurred.

Rule discharged.

(a) See *ante* 181; and Vol. II. 167.

(b) See *Hughes v. King*, 1 Jac. & W. 332. *Semble*, distress for rent is not process within 29 Car. 2. c. 7. s. 6.

1834.

BOYDELL *against* M'MICHAEL.

Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt:—Held, that his assignee, who removed and converted them, was liable in trover by the mortgagee to pay the value of them while fixed on the demised premises.

**T**ROVER for goods and chattels, to wit, stoves, grates, dressers, shelves, cisterns, cupboards, and pieces of wood. Plea: general issue. At the trial before *Bolland B.* at the *Westminster* sittings in *Hilary* term 1834, the following appeared to be the facts:— On the 5th *July* 1831, the defendant granted a lease of a house for nineteen years to one *Ryan*, which lease recited his having paid 350*l.* premium, but contained no mention of fixtures. It appeared, however, by a memorandum and receipt signed by the defendant's attorney, that the 350*l.* was a consideration for the lease, and for the absolute purchase by *Ryan* of the whole fixtures then on the premises, and that 100*l.*, part of the 350*l.*, was the price agreed on for the fixtures. *Ryan* afterwards put up some other fixtures, and on 30 *Nov.* 1832 mortgaged the lease by assignment to the plaintiff, "together with all the fixtures &c. fixed and fastened in and upon the premises." He continued in possession till 5th *June* 1833, when a fiat in bankruptcy issued against him before the payment of the mortgage money. On the 18th the defendant, his lessor, was chosen one of the assignees, and after having notice of the mortgage, caused the whole of the fixtures then on the premises to be removed to his own house. He then delivered the key of the house to the plaintiff, and refused to give up the fixtures. At the trial it was proved that their value was diminished two-thirds by being removed; the jury found a verdict for the plaintiff for 75*l.* as their value when fixed, and the learned baron reserved the question whether or not they passed to the assignees of *Ryan*, as being in his possession as reputed owner, under 6 *Geo. 4. c. 16.*

s. 72. (a), giving leave to the defendant to move to set aside the verdict, and enter a nonsuit.

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Accordingly, in the same term,

*Follett* moved on two grounds :—First, that the fixtures passed to the assignees, as being in the reputed ownership of the bankrupt; and secondly, that no property in them passed to the mortgagee by the mortgage of the term, so as to enable him to maintain trover. The bankrupt's house is leasehold; then fixtures annexed to it became the defendant's property as owner of the freehold. [*Bayley* B. That would be so if the fixtures had been demised by him with the premises. Here they were purchased and paid for separately.] The absolute ownership of the tenant's fixtures would not have passed to the plaintiff as mortgagee of the house, but only the use of them during the term, the tenant having a right as against the landlord to remove them during that term. In *Trappes v. Harter* (b) fixtures used in a trade were held to pass to assignees of bankrupt tenants as against a mortgage of the premises and fixtures by the latter. These were, in all respects, personal chattels as regarded the tenant, and were subject to any execution against him, and would have passed to his executors. [*Bayley* B. As the assignment mentioned the fixtures eo nomine, it is valid as between mortgagor and mortgagee to pass them to the latter, if they are goods and chattels. But whether they are to be considered such between him and the assignees of the bankrupt mortgagor, is worth consideration.

*Per Curiam*.—(*Bayley, Vaughan, Bolland, and Gur-*

(a) See *Stores v. Hunter*, 3 B. & C. 368; 5 D. & R. 240.

(b) *Ante*, 608.

BOYDELL *ney, Bs.)* Rule granted on both points. Afterwards,  
 v.  
 M<sup>C</sup>MICHAEL. in *Trinity* term 1834, the court (*Parke, Bolland, Al-*  
 (Trin. 1834.) *derson, and Gurney, Bs.)* stopped

*Erle and Jardine*, who were about to show cause for the plaintiff the mortgagee (a), and after intimating that *Horn v. Baker* (b) decided the case, called on

*Follett* to support his rule. This was an action by a mortgagee of a term against the assignee of the mortgagor who had become bankrupt, that assignee being also landlord of the premises let, to recover from the defendant the value of certain fixtures purchased from him by the bankrupt, and by the latter mortgaged to the plaintiff. The plaintiff is to show what right he

(a) The points of their argument were intended to be these. The object of 6 *Geo. 4. c. 16. s. 72.* was to prevent a delusive appearance, by which credit might be obtained. Fixtures of a domestic nature cannot be calculated upon by any person dealing with a trader, the tenant of a house, as part of his assets; for it must always be uncertain whether such fixtures really are at his disposal. Fixtures being here included in the mortgage, no change of possession was necessary. The question has often been, whether mere moveables would pass in such cases? Fixtures, viz., chattels slightly annexed, have never passed except where custom has made them moveables, or where they have been held out to creditors as part of the stock, or where they have been part of trade machinery. The decision in *Trappes v. Harter* could not have been different from what it was; for, first, the articles were not included in the mortgage; secondly, where they were included, as in the case of the steam engines, they were held not to pass, though tenant's fixtures; thirdly, the mortgagee assented to their being classed as stock at a meeting of creditors; fourthly, the bankrupts were real as well as reputed owners of them; fifthly, they were articles solely used in the bankrupt's trade; sixthly, there was a custom to regard them as moveables. After the mortgage in this case, the bankrupt was tenant to the mortgagee of house and fixtures, thus resembling furniture let with a house to a bankrupt, which does not pass to his assignees. See the judgment in *Steward v. Lombe* (c), *Rufford v. Bishop* (d), *Hubbard v. Bagshaw* (e), *Coombs v. Beaumont* (f).

(b) 9 *East*, 215.

(c) 1 *Brod. & B.* 506.

(d) 5 *Russ.* 346.

(e) 4 *Sim.* 326.]

(f) 5 *B. & Adol.* 72.

had to the fixtures. [*Alderson* B. The only question before us is that reserved by the judge at the trial, viz. whether they were in the possession of the bankrupt as reputed owner.] [*Parke* B. He was entitled to the freehold, with its appurtenances, for a term of years at least; but the defendant has taken away part of those appurtenances, viz. the fixtures; besides, the tenant, before his bankruptcy, had paid on a distinct valuation for them, and the mortgagee was entitled to them by virtue of the mortgage.]

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The bankrupt mortgagor having purchased these fixtures separately from the term, the plaintiff has no interest in them at all as mortgagee of the leasehold interest only; or if he has, they passed to him either as part of the freehold, so that trover would not lie for them, if severed, in respect of his right to use them for the term, or they passed to him as matters distinct from the freehold, in which case they were chattels in possession of the bankrupt as reputed owner. Assuming that the plaintiff as mortgagee is entitled to the whole interest in them which the tenant possessed at the time of the mortgage, that is, for the term at least; then, if they were part of the freehold, when by severance they ceased to be so, neither the tenant nor the plaintiff claiming under him, had any longer a right to sue for them in trover. The defendant only could sue as lessor and owner of the freehold. Thus, if a timber tree be cut down on premises let for years, the tenant can only sue for the special damage sustained in its loss (a).

There is no occasion to impugn the cases of *Horn v. Baker* (b), *Clark and Others Assignees v. Crownshaw* (c), or *Coombs and Others Assignees v. Beau-*

(a) *Herlakenden's case*, 4 Rep. 62, b; 1 Saund. 322, b. n. (5).

(b) 9 East, 215.

(c) 3 B. & Adol. 804.



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ment (a). *Trappes v. Harter* (b) in this court is in favour of the defendant, though it ultimately turned upon the question, what species of fixtures were intended to pass to mortgagees. In those cases, the owners of the freehold were also owners of the fixtures, and demised both together, so that the subsequent mortgage of the term passed the freehold in the fixtures to the mortgagee as against the subsequent assignees of the mortgagor, they having no other right; whereas while this mortgage only conveyed the use of the fixtures for the term, this assignee was as lessor entitled to them at its expiration as landlord, and could not therefore be sued in trover for taking them away during its continuance. The reason for the decision in *Horn v. Baker* is, that the fixtures were originally part of the freehold, being placed there for the purposes of trade by the owner, and therefore that whoever was entitled to the freehold was entitled to the rest, and that being supposed to be the landlord's property while fixed, they are not chattels in the reputed ownership of the bankrupt. Then has this plaintiff any interest?

[*Parke B.* He has all the interest the tenant had before he became bankrupt. The situation of the tenant at that time was this. He was entitled to the freehold with the fixtures for his term, and might remove them at any time before it expired. They were part of the freehold during the term, subject to that right to sever them and make them chattels. The tenant then bargained and sold his right to that freehold, including those fixtures, after which, the assignee takes possession during the term. He can

(a) 5 B. & Adol. 72; published since *Trappes v. Harter* appeared in these reports.

(b) 3 Tyr. 603.

have no right to do so except under 6 *Geo.* 4. c. 16. s. 72. Now, during the whole course of my professional life, since the decision of the case of *Horn v. Baker*; I have always considered it as settled that articles fixed to the freehold do not pass to the assignees of the party occupying the premises as tenant; and as to the form of action, this defendant's wrongful separation of a part of the freehold during the term was an injury to it, which may be waived, and trover may be supported for the severed chattels.]

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v.  
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(*Tria.* 1834.)

Why should these articles be considered not to be chattels as regards the assignees of a bankrupt tenant, when his judgment creditors or executors would be entitled to them as such? [*Bolland B.* The question is, whether the situation of these articles is what was contemplated by the bankrupt laws, viz., such as would gain a credit from persons seeing them. The moveables of a trader may gain him credit, but would the possession of articles on his premises, the property in which, from their position in being fixed to a wall &c. is equivocal, induce credit to be given him? They may still be chattels in their fixed state, but do they obtain him credit? (a)]

PARKER B.—The first point made in support of this rule was, that after severance of these fixtures from the freehold, trover would not lie for them by the party entitled to the use of them for the term. Supposing that he had that interest and no more, I think the action would lie; for if a trespass be committed to a house in possession of a tenant for years, by taking away part of the materials of the building, could not the tenant sue for it in trespass de bonis asportatis? I am aware that if timber trees be cut down on a

(a) See *Amos and Ferrard*, 195; *Rufford v. Bishop*, 5 Russ. 346; *Huobbar v. Bagshaw*, 4 Sim. 326, ante, 618, n.

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tenant's premises, he can only sue for the damage he sustains by losing their shade &c.; the interest in the body of them remaining in the lessor as part of his inheritance. But while *Bowles's* case (a) confirms that law as laid down in *Herlakenden's* case, and shows that the owner of the inheritance has the same right to the timber and materials of houses pulled down by a tenant, or blown down or disjoined by other means, "in respect of his general ownership, and because they were his inheritance;" yet it was there also resolved that if a house is blown down during the term, the particular tenant has a special property in the materials to rebuild the house with, and the like as to a tree felled for reparation. Then if the tenant would have such a special property in the materials of the demised premises as would enable him to bring trespass de bonis asportatis, he would certainly be entitled to bring an action of trover; and if he could maintain it simply in respect of his right to enjoy during the term, à fortiori he could do so, when, in addition to that right, he has also the right of severing them, and making them chattels at any time during the term.

That brings me to the second question, whether, taking these fixtures to be in the reputed ownership of the bankrupt, they passed to his assignees as "goods and chattels." I confess I have always thought it clear, since the case of *Horn v. Baker*, that fixtures were not "goods and chattels" within the meaning of that statute, whether the bankrupt mortgagor in possession had been owner of the fee, or tenant for life or for years. If they were fixed to the freehold, by whomsoever fixed, I have always considered that they were parcel of it, and not within the statute at all, and uniformly acted upon that opinion. I think that a

(a) 11 Co. 79.

plain and convenient rule by which to abide. The real nature of a tenant's interest in fixtures is this: he may, if he has purchased them or affixed them to the freehold, remove them during his term; and that right has been held sufficient to justify seizing them under a fieri facias issued against him in the same way that fructus industriales may be seized. But they are for other purposes, and particularly within the meaning of this statute, whilst they are fixed to the freehold, not goods and chattels at all.

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This plaintiff, as mortgagee of the term, takes the freehold with every thing affixed to it, as well as every right to remove which is annexed to the tenant's interest. Then can there be any question but that if any person wrongfully takes any part of it away within the term, the mortgagee may sue him in trespass de bonis asportatis? I think the point clear, and therefore that the verdict must stand.

BOLLAND B. concurred.

ALDERSON B.—It seems to me that it is in this case immaterial in what manner the party asserting a right to fixtures claims that right. For the question is decided by the nature of the property, which prevents it from passing as a chattel to the assignees of a bankrupt's estate. *Horn v. Baker* decides that fixtures while attached to the freehold are not "goods" within the meaning of the act. This is a simple and plain rule, sufficient to decide this question. If the rule of property in fixtures be simply guided by the criterion of the nature of the property, viz., whether the articles are fixed or not, it will be generally intelligible; whereas if inquiry is in every case to be made whether the party claiming them is entitled under a mortgage, or to a freehold, leasehold, or

BOYDELL      other interest, it becomes a matter of nice and intricate inquiry, which will produce confusion.  
 v.  
 M'MICHAEL.  
 (Trin. 1834.)

GURNEY B. concurred.

Rule absolute.

IN THE HOUSE OF LORDS.

Between

The ATTORNEY GENERAL, Appellant,  
 and

JACKSON, FORBES and Others, Respondents.


The decision in *Jackson and Others v.*

*Forbes and Others*, ante, Vol. II. 354, that no legacy duty was payable on the residue of an Indian estate realized in India under Indian probate, and sent to this country by the executors before final distribution by them, affirmed in *Dom. Proc.*

THIS case, (reported *ante*, Vol. II. 354,) under its original name of *Jackson and Others v. Forbes and Others*, was finally carried by appeal to the House of Lords, and after argument thereon, 28 April 1834, by the Solicitor-General (Sir C. C. Pepys) and Mr. Wray, for the appellant, and Sir Charles Wetherell and Mr. Garrett for the respondents.

The LORD CHANCELLOR stated, That the question as to the right of the crown to legacy duty had incidentally arisen before him in the court of Chancery in the course of the cause of *Jackson v. Forbes*, which regarded the rights of a natural child of the testator *Anderson*, and had been sent by him, with consent of all parties, for the opinion of the court of Exchequer, it being exclusively a question of law, arising on the construction of a revenue act. That the arguments in the court of Exchequer were to be found in *Mr. Tyrwhitt's Reports*, from which they had been cited, together with the certificate of that court that legacy duty was not payable, but, as was the usual practice in such

cases, assigning no reasons for that decision. That the whole scope of the legacy duty acts seemed perfectly sufficient to support that opinion when judged of on general principles, though it might not be so easily reconcilable with the previous cases of the *Attorney-General v. Cockerell* (a), and *Same v. Beatson* (b). Those cases, however, had been distinctly brought before the court of Exchequer, who appeared to have considered them not irreconcilable with the decision at which they afterwards arrived. That he, as Lord Chancellor, having afterwards decreed in conformity with the opinion of the court of Exchequer so certified to him, the present appeal was brought. That as there should be most cogent reasons to induce the House of Lords to reverse the decision arrived at by the means he had described, he suggested that the case should stand over for further consideration by their lordships.


1853.  
  
 ATTORNEY-  
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 and Others.  
 (June 1854.)

LORD PLUNKETT added, that the claim to the duty had been said to be founded on one principle, namely, that when property, though *Indian*, comes to be administered in this country, it is subject to the operation of the laws imposing legacy duty. Whether or not that principle was established by the cases cited to exist, without reference to or modification by the circumstances of each particular case, must receive great consideration from him before he could deliver any opinion. Afterwards, on 9 June,

THE LORD CHANCELLOR, said, "When this case was argued at the bar of this House, I had the valuable assistance of the Lord Chancellor of *Ireland*, who has since considered the cases. His opinion, which he has

(a) 1 Pri. 165.

(b) 7 Pri. 360.

1833.  
  
 ATTORNEY-  
 GENERAL  
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 and Others.  
 (June 1834.)

delivered to me in writing, coincides with my own, that the cases of the *Attorney-General v. Cockerell*, and the *Attorney-General v. Beatson*, are clearly distinguishable from the present; and that as in neither of those cases, or in any other cited case, do the facts completely agree with those of the present, there is in reality no conflict among the decisions. In the *Attorney-General v. Cockerell*, the will was proved in the Prerogative Court of *Canterbury*, and the party assumed, as the judgment of the court states, the character and duty of executor of the will of a Mr. *Robertson*. In the *Attorney-General v. Beatson* the defendant proved the will in *England*; so in *Re Ewing* (a), the will was made and proved in *England*, and the only point decided was, that assets which were in foreign funds, were, when bequeathed by a party resident in this country, liable to the legacy duty payable here. The affirming this judgment by this House will take place on the peculiar circumstances of this case, and will not, I apprehend, overrule any of the former cases I have adverted to on account of the difference in facts which I have pointed out.

Judgment affirmed.

(a) *Ante*, Vol. I. 91.

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*Trinity Term, 3 Will. 4, May 24, 1833.*

**IT IS DECLARED and ORDERED,** That in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias* or detainer under the statute 2 Will. 4. c. 39., or being arrested thereon shall go to prison for want of bail; and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 Will. 4. c. 39. schedule No. 2, unless further time to declare shall have been given to such plaintiff by rule of court or order of a judge.

When defendants are in custody on *capias* or detainer, or are arrested thereon, and go to prison for want of bail, or are rendered before declaration on any such process, plaintiffs shall declare before end of next term after such arrest, detainer, or render and notice, or defendants shall be entitled to their discharge.

*(Signed by all the Judges.)*

*Trinity Term, 3 Will. 4, May 24, 1833.*

**IT IS ORDERED,** That from the present day, in all actions against prisoners in the custody of the marshal of the Marshalsea, or of the warden of the Fleet, or of the sheriff, the defendants shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

Prisoners to plead to declarations against them, in like manner as defendants not in custody.

*(Signed by all the Judges.)*



*Trinity Vacation, 17th June 1833.*

Render in 14  
days after ser-  
vice of process  
on bail in debt  
on their  
recognizance.

IT IS ORDERED, That from and after the 10th day of *July* next, when the plaintiff proceeds by action of debt on the recognizance of bail, in any of the courts at *Westminster*, the bail shall be at liberty to render their principal at any time within the space of 14 days next after the service of the process upon them, but not at any later period; and that upon such render being duly made and notice thereof given, the proceedings shall be stayed on payment of the costs of the writ and service thereof only.

*(Signed by all the Judges.)*

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# AN INDEX

## TO THE PRINCIPAL MATTERS IN THIS VOLUME.

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### ABATEMENT (PLEA IN.)

A plea in abatement will be set aside where the title of the affidavit verifying the plea contained a transposition of the names forming the Christian name of one of the defendants. *Poole v. Pembrey*, H. 1833. Page 387

### ACTION, COMMENCEMENT OF, 873.

### ADVERSE CLAIMS.

See SHERIFF.

### AFFIDAVIT.

Affidavit by defendant in a cause must state his addition according to the Reg. Gen. Hil. 2 W. 4. No. 5; and describing him as the above-named defendant makes the affidavit irregular. *Lawson v. Case*, E. 1833. 489

### AFFIDAVIT TO HOLD TO BAIL.

An affidavit to hold to bail for debts due on several accounts, on which the defendant is arrested for the aggregate of all the sums due, is bad "in toto," if bad as to any one of the debts stated, and defendant will be discharged. *Baker v. Wills*, M. 1832. 182

Affidavit to hold the drawer of a bill, or indorser of a note, to bail, should state that the acceptor or maker had not paid the amount. *Smith v. Escudier*, M. 1832. 219

An affidavit to hold to bail for money lent was held bad for not stating by whom the money was lent. *In re Smith and another v. Stephens*, M. 1832. 219

An affidavit to hold to bail on a note payable by instalments should show them to be due, and it will not be sufficient to state that the said sum has not been paid. *Hart v. Myeris*, M. 1832. 238

An affidavit to hold to bail on a bill or note should state the amount for which it is drawn. *Brooke v. Coleman*, E. 1833. 593

*Semble*, that the allegation that the defendant was indebted to plaintiff in a sum stated will not aid an affidavit to hold to bail which is otherwise insufficient. S. C.

### AMBASSADOR.

See SHERIFF.

### AMENDMENT.

In general. See 869.

The name of the official assignee, (see 1 & 2 W. 4. c. 56. s. 22.) was omitted in the declaration by assignees of a bankrupt, but the Court allowed it to be amended by inserting his name. *Baker and another, Assignees of Bankrupt, v. Neave, Bart.* M. 1832. 233

In a declaration by an indorsee against an indorser of a bill accepted payable at a particular place, it is sufficient to allege in the declaration a presentment to the drawer, without stating any acceptance, and to prove a presentment at a particular place and refusal of payment there. The declaration stated the drawer to have drawn the bill payable to his order, and to have indorsed the bill to the defendant, and the defendant to the plaintiff; whereas it was in fact made payable to the order of the defendant, the payee, who indorsed to the plaintiff.

*Semble*, that the judge exercised a right discretion in allowing the record to be amended under 9 G. 4. c. 15. but, *quære*, if the Court in banc have power to revise the judge's exercise of that discretion. *Parkes v. Edge*, H. 1833. 364

See also, as to amendment, under 9 G. 4. c. 15., where the judge re-

serves the point of discretion for the court, *Brooks v. Blanshard*, 844  
If a declaration is amended after plea, and the defendant, having liberty to plead de novo, stands on his original pleas without availing himself of that liberty, the former plea will stand, if applicable to the declaration as amended. *Fagg v. Borsley*, T. 1833. 905

### APPEARANCE, 378.

### APPROPRIATION OF PAYMENTS.

*A.*, a solicitor to a company for building a bridge, procured one *F.* to hold shares for him on his undertaking that he (*A.*) should pay the deposits and all calls on them. *F.*'s name was accordingly registered as a shareholder. *A.* then sued a member of the company for money paid and journeys taken in the service of the company: Held, that he being in fact the real partner could not recover at law against his co-partner, no account having been settled or balance struck. A payment had been made to the plaintiff on account, but unappropriated at the time of payment: Held, that it must be applied to his legal demand accruing due before any act by him to become a partner, and not to a subsequent equitable one. *Goddard v. Hodges*, M. 1832. 209

*Semble*, if that payment had not been so applied the plaintiff might have sued at law for that prior demand. S. C.

### APPURTENANT.

See WAY.

### ARBITRATION AND AWARD.

Where it was agreed that in case an

arbitrator should award a certain annuity to be bought by the executors for the widow of their testator, he "should or might" award the same; with a proviso, that in case of a deficiency of assets of the testator the annuity should abate in a certain specified proportion: Held, that under these words it was imperative on him to insert that proviso in his award. *Crumph v. Adney*, H. 1833. 270, 279

Arbitrators having power to appoint an umpire, nominated one accordingly, who made his award, reciting his nomination by them, but misdescribing the Christian name of one of them: Held, that as in an action on the award the recital of the appointment of the umpire would be unnecessary, the award remained in force, and an attachment lay to enforce it. *Trew v. Burton*, E. 1833. 559

The affidavit of publication of an award should show in the body that the day on which it was so published was within the time limited for making the award; but it is sufficient if the jurat show that it was sworn before that time had run out. S. C.

If a stranger alter an immaterial part of an award after it is published, by striking out a wrong, and inserting a right name, the award is not vitiated, and stands as before the alteration was made. S. C.

A declaration on an award contained several counts: Held, that on a general verdict the plaintiff was only entitled to the costs of one count. *Ward v. Bell*, T. 1833. 904

### ARREST.

See COSTS.

Goods were sent by the plaintiff to the defendants, on sale or return. The defendants returned part to

the plaintiff's shopman. The plaintiff demanded payment for the whole, and was not informed by the defendants that part had been returned. He afterwards arrested them for the higher sum, but failed to recover the item charged for the article returned: Held, that there was reasonable and probable cause for the arrest for the higher sum; and the Court refused to grant the defendant his costs under 43 G. 3. c. 46. s. 3. *Roper v. Sheasby and another*, E. 1833. 486

In order to get costs under 43 G. 3. c. 46. s. 3. where the arrest is for more than the sum recovered, the defendant need not show malice, but want of "reasonable and probable cause." *Erle v. Wynn*, E. 1833. 586

And see WARRANTY.

A defendant discharged from custody on mesne process, upon giving an undertaking, which was not performed, may be arrested a second time without a judge's order, under Reg. Gen. Hil. 2 W. 4. No. 7. *Cantelow v. Freeman*, E. 1833. 579

When a defendant is arrested by process in which his name is stated in initials: Held, that "due diligence" is used, so as to satisfy the 32d article in Reg. Gen. Hil. 2 W. 4. if his name is inquired for from different people likely to know, though not at his house or office, or of his immediate friends, it being sworn that the debt being large the defendant, a foreigner, was likely to leave this country if he got notice of any intended proceedings against him. *Hicks v. Marreco*, M. 1832. 216

Defendant, as principal bailiff of a liberty, received a warrant directed to him and W. to arrest plaintiff. W. and L. were defendant's assistants. L., by order of defendant,

arrested plaintiff, telling him he must go with him to the Granby, a public-house; plaintiff answered very well; he was kept at that public-house till next day by *L.*, who then delivered him to *W.*, within twenty-four hours after the arrest; *W.* put plaintiff on a coach, which took him to the county gaol; defendant looked on and recognised that proceeding. An action having been brought for penalties incurred under 32 G. 2. c. 28: Held, first, that before plaintiff could be said to have refused to be carried to some safe &c. dwelling-house, he ought to have been asked by the officer arresting him to nominate such house, not being his own. Secondly, that the consent of the plaintiff to be taken to the inn was necessary in order to justify his being taken there, and that his mere acquiescence to the officer's requisition to do so was insufficient. Thirdly, the putting the plaintiff on the coach within twenty-four hours after the arrest in order to be carried to prison, was a carrying to prison within the act not justified by the plaintiff's merely neglecting to nominate a house to be taken to. Fourthly, that defendant was liable for *W.*'s act in so carrying plaintiff to prison within twenty-four hours. *Dewhurst v. Pearson*, H. 1833. 242

Confirmed as to the first point by *Simpson v. Renton*, K. B., T. 1833, 5 B. & Adol. 36.

### ASSESSED TAXES.

See SURETY.

### ASSIGNMENT OF LEASE.

See *Wolveridge v. Stewart*. 687

### ATTORNIES AND SOLICITORS.

An attorney who, though not admitted

in the Exchequer, conducts an action there in his own name, notwithstanding 2 G. 2. c. 23. ss. 1—5 and s. 10. cannot recover his fees or costs out of pocket from his client, and has therefore no lien for them upon a judgment recovered. Thus the costs of one action may be set off against those of another, without allowing him such fees. *Hyde v. Latham and another*, and *Latham v. Hyde*, M. 1832. 143

An attorney may recover for business done in the Middlesex Court of Requests without delivering a bill in pursuance of 2 G. 2. c. 23. s. 23. *Becke v. Wells*, M. 1832. 193

An attorney who had been admitted before 1815 and had taken out his certificate yearly, neglected to do so for the year ending Nov. 1816, but afterwards continued to take it out regularly, he practising at the Quarter Sessions in 1832: Held, that his admission and enrolment being void by 37 G. 3. c. 99. s. 31. he was liable for the penalties imposed by 22 G. 2. c. 46. s. 12. on persons not admitted as attornies, but practising as such at the Quarter Sessions. *Slack, q. t. v. Wilkin*, M. 1832. 158

Where the name of an attorney of the other Courts, but not of the Exchequer, was indorsed on process of this Court, proceedings were stayed till the name of an attorney of the Court was substituted, on payment of costs by the attorney so indorsed. *Constable v. Johnson*, M. 1832. 231

Agreement not to tax attorney's bill discountenanced. *Wootton v. Pryce*, H. 1833. 375

A solicitor for the London creditors of a country bankrupt wrote a letter to the solicitor for the country creditors, stating "I am willing on behalf of the London creditors to bear two-thirds of the expense of Messrs. B. and B. or such barrister

as you may think fit, for resisting *K.*'s proof under the commission, and investigating the accounts of the assignees at the meeting on the 18th instant; and I hereby undertake to bear and pay on behalf of the creditors two-thirds of the expenses incident thereto:" accordingly another meeting having been appointed the defendant declared he had no objection to bear as before the proportion of the expense of a barrister. Five meetings in all took place for the first-named object: Held, that the defendant was personally liable to pay two-thirds of the expenses of all the meetings. *Hall v. Ashurst*, E. 1833. 420

### AUCTIONEER.

See DISTRESS.

### BAIL AND BAIL BOND.

See MARRIED WOMAN.

A notice of bail should state the residence or residences of the bail to have been at the place or places in the notice of bail for (*i. e.* during) the last six months; and *within* the last six months, is incorrect; but in a case where the affidavit of justification accompanying the notice of bail, stated the bail to have resided at the (same) place named in the notice, for the last six months, the defect in the notice was held cured, and the bail was allowed. *Ward's Bail*, M. 1832. 208

Bail will obtain time for rendering a defendant who has been sentenced for an offence till a week after the imprisonment under the sentence shall have expired. *Campbell v. Acland*, M. 1832. 230

Where a sheriff has put in bail above, in order to render, and has obtained a judge's order for rendering at instance of himself and his bail, (*see* 11 G. 4. and 1 W. 4.

c. 70. s. 21,) that order will not be rescinded, though it might be amended by striking out all which shewed it to be granted at the sheriff's instance. *Green v. Jacobs*, M. 1832. 231

*Semble*, the notice of render should not be stated to be signed by any person as attorney to the sheriff.

S. C.

Country bail must state in their affidavit of justification, that each of them is worth the sum required in the terms of Reg. Gen. 2 W. 4. No. 19; and time to amend an affidavit, stating them to be possessed, will not now be allowed. *Rogers v. Jones*, H. 1833. 256

The assignment of a bail bond, without more, is not a step in a cause. *Woodsnam v. Pryce*, H. 1833. 375

When the condition of a bail bond is broken, and the bail are fixed by assignment taken, time given by the plaintiff to the original defendant, without their privacy, will not discharge them. S. C.

Since 2 W. 4. c. 39, the commencement of an action takes place at the issuing of a writ of summons; therefore where a plaintiff, having taken an assignment of a bail bond, sued out process thereon against the bail on the day within which the time for putting in bail above expired, the proceedings were set aside for irregularity, with costs, as premature, no cause of action having accrued till the next day; and the circumstance that the writ against the bail was not served till the 11th, made no difference. *Alston v. Undershill*, H. 1833. 427

Though a scire facias on a recognizance of bail cannot be tested before the return day of the ca. sa. against the principal, it may after. *Sandland v. Claridge*, T. 1833. 804

The four days for which it must lie in the sheriff's office need not be in term. S. C.

A bail bond will not be ordered to stand as a security on setting aside proceedings against bail, unless the plaintiff has declared *de bene esse*. (See Reg. Gen. Hil. 2 W. 4. No. 5. Vol. II. 351.) *Ballmont v. Morris*, T. 1833. 821

It is not too late to summons bail on the evening before the return day of the *scire facias* against them, in order to fix them by returning *scire feci*. *Lewis v. Payne*, T. 1833. 867

Informality in the notice of bail does not justify a plaintiff in treating it as a nullity, and issuing an attachment against the sheriff. *Rex v. Sheriff of Middlesex*, in *Duncombe v. Crisp*, E. 1833. 440

#### BAILIFF.

See ARREST.

#### BANKERS.

See STAMP.

#### BANKRUPT.

Where creditors call on a stranger to a bankrupt's estate to be the assignee, and he having declared he will not be liable to costs, assents to their appointment, an agreement by the petitioning creditor, who was also solicitor to the commission, to indemnify him against costs, is not illegal. *Gillmour v. King, Gent.*, one, &c. E. 1833. 581  
D. and K. being partners, K., the day after committing an act of bankruptcy, handed over a post bill and money to M. as agent for his brother, resident abroad, and drawer of a bill accepted by the firm, and becoming due in a few days, by way of fraudulent preference of his brother, and in contemplation of bankruptcy. Afterwards, and on the same day, D.

also committed an act of bankruptcy. It did not appear that D., while solvent, knew of the act of K. in handing over the post bill and money. A commission was afterwards issued against both D. and K.:—Held, that their assignees could recover from M. the amount of the property handed over to him by K. after his act of bankruptcy. *Burt and others, Assignees of Dawson and Kerr v. Moult*, E. 1833. 564

#### BAR OF ACTION.

See 450.

#### BASTARDY.

See COMMITMENT.

#### BILLS AND NOTES.

See AMENDMENT.

In an action by an indorsee against the drawer of a bill, accepted by F. and G. at a London bankers, the declaration did not state the acceptance at all, but stated that it was presented to F. and G. (the drawees,) for payment, and that they refused to pay. The proof was presentment of the bill at maturity at the clearing-house to the clerk of the London bankers named in the acceptance:—Held, that as the declaration did not state the acceptance, the presentment at the place fixed by the acceptors was sufficiently proved, and that the London bankers were agents for that purpose to the acceptors. *Harris and another v. Packer*.

370, n.

A promissory note in the common form, but expressed to be payable on demand, was given to the trustee of a building club, in order to secure the payment, by the maker or his sureties, of certain quarterly

contributions, payments of interest on money lent, and fines during a certain period. Arrears having become due, an action was brought on the note, and a cognovit was given for the amount then due and costs, being together less in amount than the sum in the note. That amount was paid with costs, and a receipt given expressed as being "in discharge of the debt and costs in that action." Another action having been brought on the same note for similar arrears subsequently becoming due:—Held, that it could not be maintained. *Siddall v. Rawcliffe*, E. 1833. 441

On the 23d Nov. country bank-notes were paid by *A.*, a purchaser of goods, to *B.* the vendor. On the 28th *B.* requested the purchaser's shopman, as a favour, to exchange the notes for money, and received the amount accordingly. The bank, which was situated at a considerable distance from the place where the shopman gave the money, had stopped payment two hours before. *A.* the purchaser, heard of it on the 29th, and on the 30th wrote to *B.* to inform him of the event, and that he, *B.*, was to be liable for the notes; but did not tender them to him then or for some days after, nor were they ever presented at the bank:—Held, that *A.* should have returned them to *B.* without delay, or presented them at the bank, as holder: and that having done neither, he could not recover the amount from *B.* *Rogers v. Langford*, H. 1833. 654

A bill was drawn in *Yorkshire* and accepted payable in *London*. During its currency, the affairs of the acceptor became embarrassed to the knowledge of the last indorser, who, being in *Yorkshire* on the day the bill became due, told the person who indorsed it to him, that it would probably not be paid. It

was dishonoured in *London* on that day; but before notice of that fact could arrive, the agent to the drawers called on the last indorser at *Rotherham* in *Yorkshire*, and in the course of conversation about the bill being likely to come back, said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* on *Tuesday* I will pay the money." The bill was not returned by the holder to the last indorser until ten days after this conversation, and the drawers did not receive notice of dishonour in due time:—Held, that the terms of the promise made to the indorser by the agent to the drawers not being unconditional, and having been made at a time when no laches could have been committed in giving due notice of dishonour, did not waive the necessity to give that notice. *Pickin v. Graham and another*, T. 1833. 923

### BOND.

See REPLEVIN—SURETY.

### BREACHES.

See SUGGESTION.

Under 8 & 9 W. 3. c. 11. s. 8. 390

### CHILDREN.

Born after will, &c. 61, 941

### CLEARING HOUSE.

See BILLS AND NOTES.

### COMMENCEMENT OF ACTION, 427.

### COMMITMENT.

The defendant and another magistrate, on making an order of filiation against the plaintiffs, signed and sealed two papers, supposed by



them to be duplicate originals of the order, and delivered one to the putative father, the other to the parish officer. The duplicate delivered to the overseer contained an order on the putative father to pay a weekly sum to the parish officers, while that delivered to him, the father, ordered the mother only to pay a weekly sum. On his refusing to pay arrears on that ground, a copy of the order in the overseer's possession was delivered to him:—Held, that he was liable to imprisonment for non-payment of arrears accruing subsequent to that delivery; for the order left with the overseer was the true order, and the mistake in the supposed duplicate of it delivered to the plaintiff by way of notice was cured as to those arrears by the delivery of the correct copy. *Wilkins v. Wright, Esq.* T. 1832. 824

A warrant of commitment, pursuant to 49 G. 3. c. 88. s. 3, for not paying money under an order in bastardy, must state a complaint made by a parish officer that the sum directed by the order to be paid, had not been so paid, that the sum due had been demanded, and that the magistrate adjudicated on the complaint so made. S. C. *Semble*, it should also show that the order of filiation was unappealed against, or that it was appealed against and confirmed, and that the defendant was called on to show cause for not paying the sums stated in the order. S. C.

#### COMPOSITION WITH CREDITORS.

The plaintiffs had, with other creditors of the defendants, signed an agreement to take 5s. in the pound by way of composition on their debts, to be paid by bills at four and eight months date. The

balance of the defendants' debt to the plaintiffs was not at that time adjusted, and after various efforts by the latter to agree the balance with the plaintiffs, it remained unsettled till the eight months had nearly expired, when the plaintiffs threatened proceedings for the whole amount due to them from the defendants. The attorneys on both sides then met; for the plaintiffs a composition was demanded on the whole sum appearing due to them. For the defendants it was objected that the composition claimed would, with certain wines deposited with them by defendants as a security, give the plaintiffs more than 20s. in the pound. It was then said that the balance claimed by the plaintiffs was 3217.; to which the defendants' attorney replied, that he was ready to pay 5s. in the pound on that sum. For the plaintiffs it was answered, that they would not take less than their whole demand: Held, that, under these circumstances, the tender of the composition money on the balance was dispensed with, and that the plaintiffs could only recover such composition thereon. *Reay and others v. Whyte and others*, E. 1833. 596

#### CONSTABLES.

By a public local act certain commissioners were empowered to appoint by writing such surveyors, scavengers, &c. beadle, constables, watchmen, &c. for the execution of the purposes of the act, as they should from time to time think proper. They were also authorised to appoint able-bodied watchmen to act in the night, who were required by the act to apprehend and secure malefactors and suspected persons found wandering or misbehaving themselves during the hours of watching. The watch-

men were to be sworn in as constables, and invested with similar powers. By a subsequent section it was provided, that no action &c. should be commenced against any person or persons for any thing done or to be done under or by virtue of that act, until one calendar month's notice should have been first given in writing to the clerk of the commissioners, of the cause of action, nor at any time whatever after sufficient satisfaction or tender made to the party aggrieved:—Held, that the section requiring notice to be given, extends to acts done by constables and watchmen. 2dly, That the *prima facie* evidence that constables and watchmen had acted as such, entitled them to such notice without producing their written appointments. 3dly, That where there was reasonable ground of suspicion that felony had been committed by the plaintiff, and the constables went accordingly to his house to apprehend him for it, but used more violence than necessary for that purpose, and beat him, they were entitled to notice. *Butler v. Ford and Ledger*, T. 1833. 677

### CONTRACT.

Where A., for a valuable consideration, contracted to sell and plant 70,000 trees on certain lands of the defendant, and also "well and sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, and that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him:"—Held, that evidence, of non-performance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in

an action on the agreement for their price, and for planting them. *Allen and another, assignees, v. Cameron*, T. 1833. 907

*Semble*, that this agreement meant to keep in order, not by pruning only, but by weeding and clearing the ground about the trees. S. C.

*Semble*, that if the terms of an agreement are equivocal, and do not distinctly explain what is to be done by either party, the price may be taken into consideration in ascertaining the right construction.

S. C.

### CORONER.

See SHERIFF.

### COSTS.

See INFANT.

Of several counts, see *Ward v. Bell*, 904; *Hall v. Ashurst*. 426

Where the defendant obtained a verdict on a plea going to the whole declaration, and the jury was discharged from finding a verdict on two other pleas:—Held, that the defendant was not entitled to recover costs on them. *Vallance v. Evans*, T. 1833. 865

Costs of taxation will not be allowed as "costs in the cause" on a defendant's undertaking to pay to assignees of bankrupt attorneys the taxed amount of a bill of costs due to the latter, and the "costs of the action." *Featherstonhaugh and another, assignees, &c. v. Keen*, E. 1833. 540

Where some of several defendants demur to particular counts, and plead not guilty to the rest, while the other defendants plead not guilty to the whole, the defendants who demur cannot, on obtaining judgment on their demurrers pending the trial of the issues in fact, tax their costs on that judgment; nor *semble* can they have judgment

for them under 8 & 9 *W. 3. c. 11. s. 2. Forbes v. King and others*, II. 1833. 385

A rule for discharging a party illegally arrested having been obtained, was referred by the court to a judge at chambers, who ordered the applicant to be discharged, and offered to give him the costs of his application if he would undertake to bring no action for the arrest; but on his refusal, made no order about costs. An action of trespass and false imprisonment was afterwards brought, laying inter alia as damage, that the plaintiff had been obliged to pay and had paid a large sum of money in order to procure his discharge. There was no distinct evidence of payment of the money by the plaintiff to his attorney:—Held, first, that the plaintiff was entitled to recover his costs as special damages in this form of action: but secondly, that as the declaration alleged actual payment of them by him, he could not recover that part which he had not paid, but so much only as had been advanced on his account, by his attorney, as for so much money paid by himself through an agent.

*Seemle*, that had the count only alleged that the plaintiff had been forced and obliged, and become liable to pay damages for such liability to his attorney, it might have been recovered. *Pritchett v. Boovey, bart. and others*, T. 1833. 949

Costs of lease, 104. See PLEADING.  
Costs treble. See HIGHWAY—WITNESSES.

## COURTS OF REQUESTS.

A master of a ship trading constantly from *London* to *Rotterdam*, having no residence or place of carrying

on business in *London*, but merely being there during the loading and unloading his cargo at a particular wharf, is not entitled to the protection of the *London* court of request act, where a verdict for less than 5*l.* is recovered against him, though he buys necessities in *London* for each trip. *Double v. Gibbs*, M. 1832. 224

*Seemle*, an action for use and occupation may be brought in the *London* court of requests, notwithstanding the exception in s. 11 of 39 & 40 *G. 3. c. 104. S. C.*

Where a plaintiff recovers a verdict for less than 5*l.* against a defendant residing within the jurisdiction of a local court of requests, created by statute, the defendant may, within the first four days of the next term, move to enter a suggestion on the roll to deprive the plaintiff of costs, though the judge at nisi prius had made an order under 1 *W. 4. c. 7. s. 2*, that the plaintiff should have execution within a time fixed, upon which final judgment had been signed and execution issued. *Baddeley v. Oliver*, M. 1832. 145

But *seemle*, it should be made part of the motion, that so much of the final judgment as relates to costs should be struck off the roll. *S. C.*  
The general test by which the court will decide whether the plaintiff ought to have sued in a court of requests, is the amount proved at the trial, and found by the verdict of the jury in the superior court, not that which the plaintiff claims to be due. *S. C.*

## COVENANTS, 637.

## CROPS BARGAINED AND SOLD, AND LABOUR.

See LANDLORD AND TENANT.

**CROSS ACTION.**

See 907.

**CUSTOM OF THE COUNTRY.**

See LANDLORD AND TENANT.

**DAMAGES.**

Reducing, for part breach of contract by plaintiff. See *Allen v. Cameron*. 907

**DAMAGES, (EXCESSIVE).**

See NEW TRIAL.

**DAMAGES, (STIPULATED).**See *Denton v. Richmond*, 630.**DEBT ON BOND.**

See SUGGESTION OF BREACHES.

**DECLARING AFRESH, 873.****DE INJURIA.**

See PLEADING.

*Bardons v. Selby*, 430; *Pigott v. Kemp*, 128.

**DEMURRER.**See PRACTICE (*arguing demurrers.*)**DEVISE.**

See WILL.

**DIGNITY.**

See PLEADING.

**DISTRESS.**

Goods deposited on the premises of an auctioneer, for the purposes of sale, are privileged from being distrained upon for the rent of those premises. *Adams v. Grane and others*, H. 1833. 326

Where a landlord distrained growing crops, under 11 G. 2. c. 19. s. 8.,

but sold them before they were cut, the remedy was held to be, under section 19, in an action of trespass, or on the case, for the special damage sustained by that irregularity, and no more; and in such an action on the case, with a count in trover, the landlord was held entitled to deduct the rent due to him from the difference between the price which might have been obtained had the sale been regular, and that which was obtained under the irregular sale; so that where no such difference existed, from the crops having been sold for their full value, while the rent due exceeded the produce of that sale, the tenant recovered nominal damages only. *Proudlove v. Twemlow*, H. 1833. 260

**DISTRINGAS.**

The old practice, as to the requisites of affidavits in order to ground a motion for a distringas after a writ of venire, applies to the new process by writ of summons. *Johnson v. Rouse*, M. 1832. 161

A distringas will be granted for the purpose of enabling a plaintiff to proceed to outlawry in some cases, when the affidavits are not sufficient to ground a distringas to compel the defendant to enter an appearance. *Hewitt v. Melton*, T. 1833. 822

*Phillips v. Bowen. Same v. Price*, S. P. Ibid. note.

In order to obtain a distringas the party attempting to serve a writ of summons must leave a copy of it at the dwelling-house of the defendant. *Street v. Lord Alvanley*, M. 1832. 162

The copy of the writ of summons must be left on the third day at the last call for the purpose of serving the defendant with the summons,

or no distringas will be granted. *Hill v. Mould*, E. 1833. 162 n.  
 Eight days must elapse from the day when the person who attempted to serve process last called at defendant's dwelling-house and left a copy of process, or no distringas will be granted. *Brian v. Stretton*, M. 1832. 163

Where a distringas is returned non est inventus and nulla bona, and defendant's residence is a furnished lodging, attempts to execute the warrant should be made, the copy of the distringas and warrant issued thereon, should be left at the lodgings, and an affidavit made stating the facts, and also that inquiries have been made, whether the defendant had goods elsewhere. If none can be discovered, the plaintiff will be suffered to enter an appearance for defendant and proceed to judgment and execution under 2 W. 4. c. 39. s. 3. *Cornish v. King*, E. 1833. 575

It cannot be made part of the above rule, that service of notice of declaration at the defendant's last known place of residence, and sticking up a declaration in the office, be deemed good service.

S. C.

### EASTER.

The Reg. Gen. Easter, 2 W. 4. (1832), as to the days between the Thursday before and the Wednesday next after Easter day, is altered by stat. 2 W. 4. c. 39. s. 11. *Alston v. Undershill*, H. 1833. 427

### EJECTMENT.

Service of a declaration in ejectment on one of two joint tenants in possession is sufficient, if such joint tenancy appear on the affidavit of service. *Doe d. Gaskell v. Roe*, M. 1832. 84

If a declaration in ejectment contains demises not only stating the names

of the lessors of the plaintiff, but also the character in which they demised, (e. g. A. and B. "being executors" demised,) the affidavit of service of the declaration need only state their names in order to obtain judgment against the casual ejector. *Doe v. Roe*, E. 1833. 602

### ERROR.

Non pros of writ of, 255.

### ESCAPE.

See *Blower v. Hollis*, tit. EVIDENCE.

### ESTATE.

See RECOGNIZANCE.

### EVIDENCE.

In an action in 1832, on a bond dated September, 1805, the plaintiffs, in order to rebut the presumption of its payment, proved that a sum equal in amount to the interest which would be due on it, had been paid by the obligor to M. T. in 1826 or 1827, after demand made on her behalf of interest due on a bond. Next, in order to apply that payment to the bond, they offered in evidence an indorsement thereon signed by the obligee, and stating that the principal money secured was not his money, but trust money under a will, which was to be placed out by himself and the obligor. The indorsement purported to bear date on the same day with the bond, and was attested by one of the witnesses to it, but was not proved to have been seen by or known to the obligor. Nothing appeared to show that it was not signed on the day it bore date, or at a period nearly contemporaneous:—Held, that the indorsement was admissible in evidence for the representatives of

the deceased obligee, it having been made by him against his interest at the time, and he having peculiar means of knowledge of the fact, without any motive to misrepresent it. *Gleadow and others v. Atkin and another*, H. 1833. 289

Proceedings had in an insolvent court while 1 G. 4. c. 119. was in force, may be proved by producing certified copies under the seal of the court, proved to be such, and purporting to be signed by the officer, that being the mode prescribed by 7 G. 4. c. 57., and without proving the signature of the officer as required by 1 G. 4. c. 119. *Doe v. Evans and others*, H. 1833. 339

In an action on the case for escape from custody on an attachment for non-payment of costs pursuant to a decree in equity, a count alleging the suit to have been commenced and pending is supported by proof of the order for the attachment, of the certificate of the master's taxation, and of the decree itself. *Seemle*, that a decree in equity is admissible in evidence without reciting the previous proceedings therein, or proving them, where the object of its production is to prove the existence of the decree, and not any facts previously in issue in the suit. *Quære*, if debt lies for an escape from custody under an attachment for non-payment of costs, pursuant to a decree in equity. *Blower v. Hollis*, H. 1833. 856

Where a written instrument sued on is attested by a subscribing witness, who is dead or abroad out of the reach of the process of the court at the time of the trial, it is requisite to give some evidence that the party who signed the instrument is the defendant sought to be charged under it, as well as to prove the handwriting of the

subscribing witness. *Whitelock v. Musgrove*, E. 1833. 541

Evidence must be given of identity of the obligor of a bond with the party sued thereon, where the subscribing witness proves that he never saw the defendant before or after he saw him execute it. *Logan v. Alder*. 54 n.

Where a question arose as to the identity of the plaintiff with a person who appeared in a dressing gown in the passage of the plaintiff's house near the street door, and asked a party who called to make an inquiry from the plaintiff as to the solvency of an indorser of a bill, "what his business was:"—Held, first, that without further evidence of who the person was, his identity with the plaintiff was not sufficiently established to let in evidence of what he said on that occasion; and secondly, that it was for the judge and not for the jury to decide whether the identity was sufficiently proved; for the question of identity was preliminary to the admissibility or rejection by him of the declarations of the person sought to be identified with the plaintiff. *Corfield v. Parsons*, T. 1833. 806

## EXCHANGE.

See BILL.

## EXECUTION.

Satisfaction by, see 459, et seq.

*Seemle*, that where the cestui que trust of a term vested in a trustee on trust to attend the inheritance, the term may, by 29 C. 2. c. 3. s. 10., be seized under a fi. fa. against such cestui que trust. *Doe v. Evans and others*, H. 1833. 339.

Charging in. See TRUSTEE, (*Super-seedeas*.)

Speedy execution. See *Baddley v. Oliver*, tit. COURTS or REQUESTS.

## EXECUTORS AND ADMINISTRATORS.

An administrator having received assets of the intestate converted them to his own use, and became bankrupt before he had exhibited an inventory or made his account, pursuant to the bond given under the statute of distributions, 22 C. 2. c. 10., and before any decree to pay or deliver the next of kin was obtained. The Ecclesiastical Court discharged him from the suit there, he having obtained his certificate as a bankrupt. Held, that his malfeasance in converting to his own use the intestate's assets, so that they were entirely lost to his estate, was a breach of the clause of the condition "well and truly" to administer them, and consequently that the surety in the administration bond was liable for the full amount of the money misapplied. Assuming that it is a defence to breaches assigned on an administration bond for not exhibiting a perfect inventory and making true and just account at or before a particular day, that no court sat on that day, it should be pleaded in excuse of performance, and cannot be given in evidence before a jury. On the trial of breaches suggested on the roll under 8 & 9 W. 3. c. 11. s. 8., no breach of the administration bond accrues by the administrators not distributing the residue among the next of kin till after the decree of the Ecclesiastical Court. *Archbishop of Canterbury v. Robertson*, E. 1833. 390

An administrator having arrested a debtor to the intestate, for money of the intestate had and received to the defendant's use, obtained a verdict and charged him in execution; the defendant obtained a rule for a new trial, and petitioned the

insolvent court for his discharge; under these circumstances the debtor requested to be discharged on payment of a sum considerably less than that recovered in the action, and less than the costs; the administrator eventually consented to the terms and the debtor was liberated. A creditor of the intestate sued the administrator:—Held, that the administrator was not personally liable, as for assets, for any part of the sum given in the verdict against the defendant, and was not guilty of devastavit in permitting his liberation. *Pennington and wife v. Healey*, H. 1833. 319

## EXTENT.

### See LIBEL.

A crown debtor had issued an extent in aid against his debtor, who was afterwards discharged under an insolvent act. The crown debtor subsequently satisfied the crown its debt, and sued out a scire facias against the insolvent on the extent in aid. Held, that as no debt to the crown existed he could not pursue his proceedings on the extent in aid. *Rex in aid of Hollis v. Bingham*, T. 1833. 938

## FIXTURES.

In 1797 premises in *Lancashire*, described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm, for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in

such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property. *Trappes v. Harter and another*, T. 1833. 603

In 1828 two of the partners, (then seised in fee of the freehold land and buildings under a conveyance not mentioning machinery or fixtures) mortgaged them for a term; "and also the steam-engine, mill gearing, heavy geer, mill-wright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof. They remained in possession and carried on the works till 1829, when they compounded with their creditors, and afterwards, till they became bankrupts. In April, 1831, their assignees sold and removed the machinery and utensils, except two steam engines with the first motion and main shafts attached to them, and two water wheels, which supplied power to the rest. S. C.

Held, first, That the machinery and utensils so removed having been affixed to the inheritance for the purposes of trade only, in a place where, as such, they would have commonly been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only which

passed to the assignees of the bankrupts. S. C.

Secondly, That the mortgage deed was only intended to pass that part of the machinery which from the circumstances of its erection necessarily became part of the freehold. S. C.

Where the lessee of a house for years, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt:—Held, that his assignee, who removed and converted them, was liable in trover by the mortgagee to pay the value of them while fixed on the demised premises. *Boydell v. M<sup>r</sup> Michael*, T. 1834. 974

A short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired and the tenant having quitted possession of the premises without severing the fixtures sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l*. and signed the valuation:—Held, that the plaintiff having at the defendant's request waived his right to remove the fixtures, the matter bargained for was not an interest in land within 29 Car. 2. c. 3. s. 4., and that the amount ascertained by the broker might be recovered on indebitatus assumpsit for fixtures and effects bargained and sold, without proving a note, &c. in writing. *Hallen v. Runder*, T. 1834. 959

*Seemle*, that such note, &c. in writing was not required under s. 17, respecting the sale of "goods" of 10*l*. value or upwards. S. C.

In trespass one count was for taking away "goods, chattels, and effects," and another for tearing away and severing "fixtures and effects." The pleas were the general issue



and two special pleas to the first count, stating the tenancy of the plaintiff to one of the defendants at a certain rent, which being in arrear they distrained the "goods and chattels" in that count mentioned. Replication. Similiter to first plea, and *non-tenuit* to the other two. The jury found the tenancy pleaded thirdly to exist: Held, that on the issue taken in the replication the trespasses laid in the first count were after verdict covered by that special plea, though some of the articles taken were fixtures. *Twigg v. Potts and others*, T. 1834. 969

*Semble*, the plaintiff might have demurred to the special pleas. *S. C.* Held, that the plaintiff was entitled to recover for the damage done to his house by severing his fixtures from it. *S. C.*

#### FRAUDULENT REMOVAL, 170.

##### GAME.

Trespass against two for assaulting plaintiff and tearing his clothes. The fourth plea stated, that before the committing those trespasses, plaintiff was found by defendant on the land of *W. S.* in search of game, without the licence and against the will of *W. S.*, and that plaintiff had in his possession a hare which appeared to have been recently killed. Whereupon one defendant, as servant of and by command of *W. S.*, demanded the hare, which plaintiff refused to deliver, and had in his possession. That afterwards and just before committing the trespass, the said defendant demanded the hare from the plaintiff, and because he refused to deliver it and kept it in his possession, both defendants, as such servants, and by such command, in order to take the same

for the use of *W. S.*, seized the plaintiff and took it from him, according to the form of the statute (*viz.* 1 & 2 *W. 4. c. 32. s. 36.*) The fifth plea stated, that just before the trespasses, the plaintiff had in his possession a dead hare belonging to *W. S.* without his leave or licence; wherefore defendants did, as his servants, and by his command, demand the same from the plaintiff, which he refused to deliver and detained; whereupon the defendants, as such servants, &c., seized the plaintiff (concluding as in the former plea).

The replication to the fourth plea stated, that at the several times of the demands of the defendant and refusal by the plaintiff, the plaintiff was lawfully on the highway. A similar replication to the demand and refusal in the fifth plea.

On demurrer to the replications it was held, that the fourth plea was bad, for not sufficiently showing when the second demand was made, or that it was made on the land of *W. S.*; and that the fifth plea was also bad, for not stating that the defendants gently laid their hands on the plaintiff in order to take the game, and that because he resisted, they necessarily committed the trespasses complained of, doing as little damage, and using as little violence to the plaintiff as they could on that occasion. *Wisdom v. Hodson and another*, T. 1833.

811

##### GAMING.

A game at cricket for the sum or value of 10*l.* or upwards, is illegal within the second section of stat. 9 *Ann. c. 14*; therefore an action for money had and received lies against a stakeholder to recover a stake of that value deposited with him after notice not to pay it over. *Hodson v. Terrill*, T. 1833. 929

So though the game was not finished in one day. *S. C.*

### GUARANTEE.

The following guarantee, "I agree to be answerable for the payment of 50*l.* for *L.* In case *L.* does not pay for the gin, &c. he receives from you, I will pay you the amount," is not a continuing guarantee. *Nicholson and others v. Paget, M. 1832.* 164

### HABEAS CORPUS.

See PRISONER.

### HIGHWAYS.

A surveyor of highways sued for an act done in pursuance of 13 G. 3. c. 78. s. 81. is not entitled to treble costs upon a verdict found for him. *Ward v. Bateman, M. 1832.* 221

### HUNDRED.

A writ and other proceedings against the inhabitants of the "hundred of *S.*" were amended by inserting "borough" instead, where the time for commencing a fresh action against them for felonious injury to property by rioters under 7 & 8 G. 4. c. 3. had expired. *Horton v. Inhabitants of Stamford, T. 1833.* 869

### IDENTITY.

See EVIDENCE.

### INCLOSURE.

See WAY.

### INDEMNITY.

See LIMITATIONS—STAMP.

### INITIALS.

See ARREST.

### INFANT.

An infant suing by prochein amy was nonsuited, and had judgment against him for costs. He sued out a writ of error, but took no step thereon. After the return day of that writ he was taken in execution for the costs: Held, that he could not be discharged on motion, and that the writ of error was spent, though not nonprossed. *Dow v. Clark, T. 1833.* 866

### INQUIRY.

Since Reg. Gen. Hil. 1832, No. 101. A charge for a good jury on an inquiry is allowed. If a defendant nonprosses his own writ of error, it must be on payment of costs. *Wilkinson v. Mahn. H. 1833.* 255

### INQUIRY, WRIT OF.

A writ of inquiry having been executed, and defendant having been taken in execution in vacation under 1 W. 4. c. 7. s. 1., the plaintiff's attorney should file the inquisition and subsequent proceedings, or suffer them to be copied, in order to give the defendant an opportunity of inspecting them in order to see if any ground exists for arresting the judgment under s. 4. *Townsend v. Burns, M. 1832.* 104

### INSOLVENT.

See PRACTICE (*Supersedeas*).

The defendant and a surety had signed a promissory note before the defendant was discharged under 7 G. 4. c. 57. (insolvent act;) after which, to prevent an action against the surety, the defendant joined him in a new note to the plaintiff for the amount of the old one, with interest: Held, that that note

could not be recovered on against the insolvent, for it was a new contract or security for the payment of the same debt as to which he was entitled to be discharged, and that the additional consideration of forbearance to the surety did not affect the case. *Evans v. Williams*, M. 1832. 226

*Semble*, that 1 G. 4. c. 119. s. 7., is directory only in respect to the proceedings before selling the insolvent's estate. *Doe v. Evans and others*, H. 1833. 339

### INSTALMENTS.

See **BILLS AND NOTES.**

### INTEREST.

By agreement in writing preliminary to an intended mortgage the plaintiff undertook to advance the defendant a sum on the mortgage of certain named premises; the defendant was to deliver a complete abstract of title to the plaintiff's solicitor within a week after the date of the agreement, and to produce the title deeds necessary to verify the abstract, and deduce a marketable title within a month from such delivery. If the defendant did not do so at either period, the plaintiff was to have the option of considering the agreement void. It was then agreed that the defendant should forthwith pay the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts were delivered; but they disclosed no title to some, and a defective title to other parts of the premises. The time for completing the title expired on the 24th Sept. 1831, but the negotiations went on till the 14th May, 1832; the defendant had repeated notice between those dates that the plain-

tiff's money was lying idle, but he tried to amend his title till the latter day, when it remained defective, and the bargain was broken off. Held, that the original contract remained in force, and that its terms were not sufficiently comprehensive to enable the plaintiff to recover interest, or more than the costs of investigating the defendant's title. *Sweetland v. Smith*, E. 1833. 491

### INTEREST IN LAND.

See *Earl Falmouth v. Thomas*. 264

### INTEREST OF MONEY.

See *Brigstock v. Smith*. 445

### INTERPLEADER.

See **SHERIFF.**

### IRREGULARITY.

See **PRACTICE** (*Irregularity*).

### ISSUE FROM CHANCERY, 73.

#### JUDGE'S ORDER, 375.

See **PRACTICE** (*Judge at Chambers*).

A judge's order is a nullity if obtained from his clerk by misrepresenting his decision. *Woomam v. Pryce*, H. 1833. 375

### JUDGMENT AS IN CASE OF NONSUIT.

Issue was joined in a town cause in the term, and notice of trial was given for a sitting in it, but countermanded. It is premature to move in the *same* term for judgment as in case of nonsuit, on affidavit that the plaintiff had given notice of trial, and neglected to proceed to trial. [See Reg. Gen. Easter, 5 G. 4. Vol. i. App. xii.] *Isaacs v. Goodman*, E. 1833. 559

When after general issue and plene administravit pleaded, defendant moved for judgment as in case of nonsuit, the court discharged the rule on a peremptory undertaking to try the first issue only, allowing the plaintiff to take judgment quando acciderint on the second.  
*Lucas v. Jenner*, E. 1833. 564

### LACHES.

See **BILLS AND NOTES.**

### LANDLORD AND TENANT.

See **RENT (Increased)—LEASE.**

Declaration stated in four counts that plaintiff was possessed of a farm, on which were certain crops then growing, and on which the plaintiff had bestowed certain work and labour, and used certain materials in making the same ready for tillage, and of which work and labour plaintiff at the time of making the promise in the declaration had not derived the benefit; that in consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the said crops and pay for them, and for the said work, labour, and materials, according to a valuation made by certain persons; averment, that plaintiff let the farm accordingly, and left the said crops so growing and being thereon; that the defendant took possession of the farm and crops, and had the benefit of the work and materials, and took the crops to his own use; that the valuation was made at 147*l.*; that defendant was requested but did not pay. Plea, that the crops and the benefit of the work, &c. were not accepted, or reserved out of the agreement to let, and that no agreement in writing in respect of the causes of action in the above

counts mentioned, or any memorandum or note thereof, wherein the said premises of the said defendant in those counts were stated or shown, was in writing, signed by defendant or any other person thereunto by him lawfully authorized. Held, on demurrer, that by the contract the defendant was to have had the land as well as the crops then growing on it, and as the labour and materials were so incorporated with the land as to be inseparable from it, the rights to the crops and the benefit of the work and labour were both of them an interest in land within the statute of frauds, 29 *Car. 2. c. 3. s. 4.*

Another count stated a promise to manage the land in a good and husband-like manner, and, according to the custom of the country: the breach was, that he did not manage, &c. (in the words of the promise), but, on the contrary, managed it in a bad and unhusband-like manner, contrary to the custom of the county where the said farm was. *Semble*, on special demurrer, that the breach was sufficiently assigned, but amendment, by inserting the particular facts, was recommended.

Indebitatus assumpsit count, for crops bargained and sold, and under and by virtue of such bargain and sale accepted, taken, had, received, and cut down by the defendant. Plea: that the crops at the time of the bargain and sale were growing on and affixed to certain lands belonging to and in possession of plaintiff; and that while they were so growing and affixed, and just before the said bargain and sale, there was a treaty on foot between plaintiff and defendant, by which it was proposed that plaintiff should let the said lands to defendant for fourteen years, and the defendant should take the lands for that

term, and therewith should take the said crops; that plaintiff and defendant assented to the treaty, and in order to carry its terms into execution the supposed bargain and sale was verbally contracted between them, but that there was no agreement in writing, or any memorandum or note thereof. Held, (on general demurrer to the plea,) that the crops at the time of the bargain and sale were an interest in the land, and within the statute of frauds, so that though the defendant had had the benefit of them he was not obliged to pay for them on the terms of that bargain and sale, but on a "quantum meruit" only.

**Indebitatus assumpsit** count, for work and labour done, and materials used by plaintiff in and about preparing for tillage certain lands afterwards let by plaintiff to defendant at his request. Plea in substance like the last, the same point held "*à fortiori*."

**Indebitatus assumpsit** count, on an account stated. Plea, that before the taking of the account there was a verbal agreement for the sale of crops growing on the plaintiff's land, and for work, labour, and materials done and used in preparing the land for tillage; that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; that the money so to be paid for the crops, &c. was that concerning which the account was stated, and that there was no agreement in writing, or any note thereof.

**Replication:** That before the account was stated the defendant had mown the crops, and taken them to his own use, and had had and received the amount of the work and labour and materials.

**Rejoinder:** Traversing the cutting of

the crops and receipt of the amount of work and labour, &c. before the stating the account.

**General demurrer:** Held, that the contract in the pleadings was within 29 Car. 2. c. 3. and not being in writing could not be recovered upon.

Where there are cross demurrers to the declaration and to the pleas, the defendant's counsel begins and has the reply. *In re Earl Falmouth v. Thomas*, M. 1832. 26

Plaintiff agreed to take from defendant a farm for fourteen years, and to pay him 95*l.* for tillages and improvements already done on it; by the same agreement the plaintiff was to receive upon quitting, from the succeeding tenant, the value, according to a valuation to be then made, of the tillages, &c. done by him, and which he should leave on the farm; the plaintiff did not pay the 95*l.*, but entered and did tillages, &c.; in three months after entry he said he would quit, and defendant said he might. No bargain was then made about the tillage, &c. the plaintiff had done. Held, that the circumstances under which he quitted were not such as would entitle him to recover the value of them under the agreement. *Whittaker v. Barker*, M. 1832. 135

The plaintiff was tenant to the defendant from year to year, the defendant then, by agreement in writing, signed by both the plaintiff and defendant, lets the farm to the plaintiff on new terms therein stated, the rent to be fixed by valuation of two arbitrators, and sureties for its payment to be found by plaintiff; the arbitrators never fixed the amount of rent, no sureties were ever given, nor was rent ever paid after making the agreement. Held, that though the instrument contained words of pre-

sent demise, it did not operate as a lease, but only as a negotiation for a lease, which did not determine the former tenancy. *John v. Jenkins*, M. 1832. 170

A plea in bar to an avowry stated that only 10*l.* was due for rent, and then pleaded a tender of that sum; the proof was that only 15*l.* 16*s.* was tendered. Held, a fatal variance, though only the latter sum was proved to be due for rent. *S. C.* *Semble*, the jury may decide on the question of fraud or not in a removal of goods off demised premises, though it be admitted that it took place in order to avoid a distress. *S. C.*

By agreement dated in 1827, *W.* and *H.* took premises from the plaintiff for three years, with power to claim an extension of the term to seven years; they occupied in partnership till July, 1828, when it was dissolved, and *W.* retired into the country. However, in January, 1829, he, in compliance with plaintiff's desire, joined *H.* in a notice to the plaintiff to extend the term according to the agreement. In Jan. 1829, *H.* took *S.* into partnership, and continued to occupy till Sept. 1831. In Feb. 1829, the plaintiff authorized his attorney by letter to draw a lease to *H.* and *S.* and gave the letter to *H.* who never delivered it, nor was such a lease executed. The plaintiff's receipts for rent purported to be from *H.* and *W.* while in partnership from *H.* when *W.* had retired, and from *H.* and *S.* after *S.* was taken into partnership. *Graham v. Whickelo*, M. 1832. 201

Held, the original tenancy of *H.* and *W.* was not surrendered by act or operation of law under 29 *Car. 2. c. 2.* and consequently *W.* remained liable for the rent. *S. C.*

*Quære*, if after nolle prosequi entered quoad one defendant, who has

pleaded bankruptcy, he is a witness for the other to resist a prior claim against both. *S. C.*

One of the covenants in an expired lease was, that the tenant on quitting the farm "should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant."

The custom of the country was similar, with this addition, that by it an outgoing tenant was entitled to be paid for the manure left:—Held, that as by the lease an express stipulation on the subject was made, the custom was excluded, and an outgoing tenant, who held under the terms of the lease, was not entitled to recover for the manure. *Roberts v. Barker*, T. 1833. 945

## LEASE.

See LANDLORD AND TENANT.

Where a lessee, who has covenanted to pay rent, assigned his term by indenture indorsed on his lease, "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease." Held, that he could not recover in covenant against his assignee, for rent which became due after assignment over by the latter; though the lessee had been called on to pay the same to the lessor, under the covenant in the lease. *Wolveridge v. Steward (in error)*, T. 1833. 637

## LEGACY DUTY.

By a marriage-settlement 20,000*l.* was vested in trustees on trust, to pay the interest to the father of the wife for his life, after his death to the husband for life, with re-

mainder to the wife for her life, with a power of appointment among her children, if any; and in default of issue, then on such trusts, and subject to such direction and appointment, as she should make by will in case she died in her husband's lifetime, or by deed or will in case she should survive her husband; and in default of such appointment by her, in trust for her next of kin. The wife died in the lifetime of her husband, having by her will appointed the above sum to certain described persons. Held, that legacy duty was payable in respect of it. *In re Cholmondeley, deceased*, M. 1832. 10

The surviving executor of an executrix of an executor of *P.*, the original testator, who died in 1812, was called on in 1833, under 42 G. 3. c. 99. s. 2. to show cause why he should not account for legacy duty due from the estate of *P.* The surviving executor swore that he had never had in his hands assets of *P.*, the original testator, or of his own testatrix, and that he knew nothing of her estate, never having acted as her executor, except in proving her will and signing necessary papers. The court refused to make the rule absolute, according to the discretion vested in them by the above act to do so, if it appeared to them to be proper and necessary for better enforcing payment of legacy duty. *In re Pigott deceased*, T. 1833. 859

The decision in *Jackson and others v. Forbes and others*, ante, Vol. II. 354, that no legacy duty was payable on the residue of an Indian estate realized in India under Indian probate, and sent to this country by the executors before final distribution by them, affirmed in *Dom. Proc. Attorney General v. Jackson, Forbes, and others*. 982

## LIBEL.

See SLANDER.

A plaintiff, who recovers damages for a libel against the editor of a newspaper, cannot have an extent against him and his sureties on their recognizances or bonds, pursuant to 60 G. 3. c. 9. and 11 G. 4. and 1 W. 4. c. 73. s. 3. without satisfying the court, by facts detailed in the affidavit, that the plaintiff has not been able to procure satisfaction by writ of execution against the defendant's goods. *Pennell v. Thompson*, T. 1833. 823

Plaintiff had superintended the works of a railway company as engineer, but was discontinued by them. The situation of civil engineer to another undertaking having subsequently become vacant, the plaintiff became a candidate. The defendant having written to *A.* (*Laing*) introducing *Bush* as a candidate, *A.*, after the event of the election was known, wrote to the defendant, telling him that *C.* had been elected. The defendant then wrote a letter to *A.* stating matter in disparagement of the plaintiff while engineer to the railway. Defendant and *A.* were both shareholders in the railway, and defendant managed *A.*'s affairs relative to it. That letter having been shown, occasioned the loss of the plaintiff's election on a subsequent vacancy in the office of civil engineer to the other undertaking. Held, that as the letter containing the libel was written by the defendant after the first election was ended, and before the second was contemplated, without his having been called on to give an opinion about the plaintiff, it was not a privileged communication. *Brooks v. Blanshard*, T. 1833. 844

If a count on a libel state an imputa-

tion on the plaintiff of "mismanagement or ignorance," and the proof is "ignorance or inattention," it is a fatal variance. *S. C.*

Where a declaration stated the defendant to have published a libel concerning the plaintiff in the form of a letter containing "the false, &c. matter following," and owing to the letter having been burnt, secondary evidence of its contents was given by means of the oral testimony of two witnesses, each of whose statements differed from that made by the other, and also from that laid in the record: Held, that as no matter in print or writing was produced in evidence, the judge at nisi prius had, under 9 G. 4. c. 15. no power to amend the declaration. *S. C.*

*Quære*, whether amendment could have been made by a copy produced in such case as secondary evidence.

*S. C.*

[See now 3 & 4 W. 4. c. 42. s. 23.]

### LIEN.

A person to whom a horse is delivered to be stabled, taken care of, fed, and kept, has no lien on him for the expense incurred in so doing. *Judson v. Etheridge*, T. 1833. 954

### LIMITATIONS, (STATUTES OF.)

The operation of the statutes of limitations will not be barred by a written acknowledgment of a pre-existing debt, unless a fresh promise to pay it can be inferred from the terms used:—Held, that a letter from a defendant denying his liability to pay the plaintiff's claim, and containing no acknowledgment of its validity, though pointing out a time for communicating personally with the plaintiff about it, did not take a case out of the statute,

and that a nonsuit was right. *Brigstocke v. Smith*, E. 1833. 445

*Semble*, part payment will not bar the statute, where the debt to which it is applied consists of several items.

*S. C.*

In order to take a case out of the statute of limitations, it is not necessary that the acknowledgment or promise required by 9 G. 4. c. 14. s. 1. to be in writing signed by the party chargeable thereby, should also state the amount of the debt, and extrinsic evidence is admissible to prove such debt. *Lechmere, bart. and others, v. Fletcher*. E. 1833. 450

*Lechmere* sued *Fulljames* and *Fletcher* in a joint action for money lent. The defendants pleaded separately; *Fulljames* the general issue only, and *Fletcher* the general issue and the statute of limitations. The plaintiff had a verdict and judgment against *Fulljames*, but not against *Fletcher* on either issue. After six years had elapsed from the original transaction, but previous to the bringing the last-mentioned action, *Fletcher* had, in a letter to the defendants, declared his readiness to pay them *his proportion* of the debt to them from *Fulljames* and himself. Upon the new promise contained in this letter a special action of assumpsit was brought by *Lechmere* against *Fletcher* for that proportion. At the trial the judgment against *Fulljames* was proved, but it did not appear that execution had issued against him:—Held, that neither that judgment against *Fulljames*, nor the former verdict for *Fletcher*, barred *Lechmere* from recovering against *Fletcher* on his subsequent separate promise to pay his proportion of the debt originally due from himself and *Fulljames*, to the extent not of nominal damages only, but of the whole propor-



tion proved to be such by extrinsic evidence; for evidence which could not have been adduced in the former action might have been given in the latter; *e. g.* *Fulljames* might then have proved that the defendant *Fletcher* had been a joint contractor with him to *Leckmere*, whereas *Leckmere* could not have so proved a joint debt in his first action against them both, or could he have used *Fletcher's* written acknowledgment as to a moiety, to take the joint debt out of the statute of limitations. *S. C.*

Payment of money into court admits the contract as pleaded, and damages thereon to the extent of the sum paid in; but where it was made on a special count alleging a new promise to pay the defendant's proportion of a joint debt, so as to take a case out of the statute of limitations:—Held, that it did not admit the amount of that proportion, it being laid under a *videlicet*. *S. C.*

The master of a ship was dispatched by the owners from *England* to *Miramichi*, with orders to buy timber and draw on them for the amount. He went there accordingly, bought timber, drew a bill there on them for the amount, in favour of the seller or his order, and delivered the cargo to the owners in *Liverpool*, before the bill, which was drawn at 60 days' sight, was presented to them there for acceptance, and before 60 days from its date had elapsed. The bill, bearing several indorsements, was duly presented to the defendants for acceptance, and was protested for non-acceptance. The plaintiff was known to be at *Liverpool* for several months after the refusal to accept, before he went to *India*. On his again going to *Miramichi* he was arrested as

drawer of the bill, at the suit of an indorser, and paid it in order to his liberation. He then sued the defendants in a special action of *assumpsit*, for not paying the bill, for not accepting it, and for not indemnifying him against all loss, &c. sustained by him from the drawing it. He did not prove at the trial that he had received any notice whatever of the dishonour:—Held, that under the circumstances existing between the parties to the action, such notice was not an essential part of the plaintiff's case, and also that the law would imply a promise by the defendants, not to accept or pay the bill, but to indemnify the plaintiff against the consequences of his drawing it; consequently, that the statute of limitations did not apply, though no damnification occurred till more than six years after the promise to indemnify. *Huntley v. Sanderson and Wilkinson*, E. 1833. 469

## LOCAL ACT.

See CONSTABLE.

## LODGINGS.

See DISTINGUISH.

## MARRIAGE SETTLEMENT.

Real property was conveyed by marriage settlement to the trustees to the use of husband for life, and after his decease to the use and intent that his wife, if surviving, should receive a weekly sum out of the rents, and subject thereto that the trustees should thereafter stand possessed of the residue of them, to the use of all and every the child and children of the settlor's former wife (naming them) and their issue lawfully begotten and to be begotten, equally to be divided between and amongst

them, as tenants in common, and not as joint tenants, and his, her, or their respective issues. Held, that the children of the first marriage took for life, subject to the widow's allowance, and that grandchildren born after the settlement, whether before or after the death of the settlor, their grandfather, took no estate. *Wheeler v. Duke and others*, M. 1832. 61

### MARRIED WOMAN.

A married woman will be discharged from arrest upon filing common bail, or the bail bond will be delivered up to be cancelled if her coverture is not disputed and she has used no deceit before or at the time of obtaining the credit; nor will her subsequently giving a bill of exchange to the plaintiff in part payment vary the rule. *Freams v. Mitford*, M. 1832. 139

### MASTER AND SERVANT.

See **TRESPASS**.

One of two joint-tenants of a house where the partnership business is carried on, may authorize a servant of the partnership to remain on the premises, though the other has given him notice to leave the service. *Donaldson v. Williams*, H. 1833. 371

### MORAL OBLIGATION.

See *Paynter v. Williams*, tit. POOR.

### NEW TRIAL.

If a plaintiff has a right to a new trial on the ground of excessive damages, it will be granted generally and without being limited to that question only. *Mahony v. Fraz*, H. 1832. 264  
After a verdict for 20*l.*, a new trial is only granted where it can be

granted without costs, *e. g.* for misdirection, &c. and not where it could only be granted on payment of costs, *e. g.* for a verdict against evidence. *Bryan v. Phillips*, M. 1832. 181

### NOTICE OF ACTION.

See **CONSTABLE**.

### NOTICE OF TRIAL.

See **PRACTICE**.

### OFFICE AND OFFICER.

See **PAYMASTER**.

### OUTLAW.

An outlaw died abroad before a treasury warrant and attorney-general's consent were granted, in order to authorize the sheriff to pay over money in his hands to the plaintiff in the action under a *capias utlagatum*:—Held, that that warrant and consent granted in ignorance of the defendant's previous death, did not vest the money in the plaintiff, and the court, on motion of the defendant's executors, stayed payment over to the plaintiff by the sheriff till their plea of defendant's death should be traversed and the facts tried. *Rex at the suit of Nightingale v. Buchanan*, M. 1832. 229

### PARTNERS.

See **LANDLORD AND TENANT**—**MASTER AND SERVANT**.

### PARTNERSHIP.

See **APPROPRIATION OF PAYMENTS**.

### PAYMASTER.

By the statute 48 G. 3. c. 1. s. 10., the six commissioners of the trea-

sure shall and may, from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit, to be the paymaster or paymasters of the exchequer bills; and by s. 12, such paymasters are to have and receive such salaries and allowances as the commissioners for the time being shall direct to be allowed them; but there is no express enactment that the commissioners might remove such paymasters at pleasure:—Held, that the office of paymaster of exchequer bills is an office during pleasure only, and not for life or during good behaviour. *Scmble*, that the appointment of a new paymaster, reciting in the instrument of his appointment that a former one had resigned, is a revocation of his appointment, whether he has in fact resigned or not; particularly if the former paymaster sue for the emoluments of his office, as having been received to his use by his successor; and *scmble*, that such revocation may take place, though no power of revocation is reserved in the first appointment, and no revocation is stated in the second. *Smyth v. Latham*, (in Error,) E. 1833. 509

The fact of the former paymaster's resignation need not be proved by the new one in an action against him by his predecessor for fees received to his use, though stated in the successor's appointment to the office, produced at the trial. *S. C.*

## PAYMENT.

See APPROPRIATION.

Rebutting presumption of. See EVIDENCE.

Payment in part. See *Brigstocke v. Smith*, 445.

Of money into court. See *Lechmere v. Fletcher*, 450.

In satisfaction of execution, 459, et seq.

## PERFORMANCE.

Pleading in excuse of.

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## PLEADING.

See LIBEL—SLANDER.

Where a defendant agreed to pay the plaintiff the sum of 25*l.* in full for his share of the costs of a lease to the defendant, to be procured for him by the plaintiff, and to be prepared by his solicitor, and of an agreement for so procuring it: Held, that the declaration was sustainable without any allegation that costs had been incurred, or of their amount, or that notice had been given thereof to the defendant. *Townsend v. Burns*, M. 1832. 104

If a plea pleaded as in answer to the whole of a count leaves unanswered any good part, the plaintiff will have judgment on demurrer. *Crump v. Adney*, E. 1833. 270, 279

In trespass for assault, a plea stated that *J. E.* and *S. B.* were possessed of a dwelling-house and close, and being so possessed the plaintiff was wrongfully there making a noise, &c.: and that defendants as servants of *J. E.* and *S. B.*, and by their command, requested him to depart, which he refused: whereupon defendants, as their servants, gently laid hands on plaintiff, &c.: and because plaintiff was armed with pistols, and assaulted them, they to protect themselves necessarily laid hold of and a little hurt the plaintiff:—Held, that a general replication "de injuria" is good, for the command of *J. E.* and *S. B.* may be involved in the issue so raised without any special traverse. *Pigott v. Kemp and others*, M. 1832. 123

Trespass for assaulting the plaintiff in the county of *Somerset*; the plea justified the assault in defence of

possession of a dwelling-house, with an averment "which are the said supposed trespasses, and whereof the said plaintiff hath complained against the said defendants;" and concluded with a traverse "without this the plaintiff was guilty elsewhere than in the said dwelling-house:"—Held, that the quæ sunt eadem included in the traverse the place laid in the declaration, and that the plea was therefore bad on special demurrer for surplage in adding a special traverse. *Hembrow v. Bailey and others*, M. 1832. 152

The plaintiff's declaration described him as Earl of *Stirling*; the defendant pleaded in abatement that the plaintiff was not nor is Earl of S. A replication that he was and still is Earl of S., concluding to the country, was held bad on demurrer for default of shewing how he claimed that dignity, so as to decide the mode of trial. *Seemle*, that the dignity thus claimed must be taken to be English, the Christian and surname of the party not being stated, as must be done in cases of dignities not English. *Stirling, Earl of, v. Clayton*, M. 1832. 154

Where in an action on a promise to pay the debt of another, the plea is that no note in writing was signed by defendant or any person, &c. *Seemle*, the plaintiff cannot take issue, but must set out the agreement in his replication. *Lowe v. Eldred*, M. 1832. 234

Issues tendered in pleading must not be alleged argumentatively, but in terms on which a direct issue can be taken; thus where in debt on a bail bond, the plea stated that no proper affidavit of debt was filed in the original action, it was held bad on demurrer. *Hume and others v. Liversidge and others*, H. 1833. 257

Since 2 W. 4. c. 39, (Uniformity of Process Act), no declaration in the Exchequer should state any debt to the king in its commencement, or contain the old quo minus clause at the end. *Hurst v. Pitt*, H. 1833. 264

An avowry stated that the plaintiff was an inhabitant of a parish, and rateable to the relief of the poor in respect of his occupation of a tenement situate in the place in which, &c.: that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*: that he had notice of the rate, and was required to pay, but refused: that he was duly summoned to a petty session to shew cause why he refused: that he appeared and shewed no cause; whereupon a warrant was duly made under the hands of two justices of the peace, directed to one of the defendants, requiring him to make distress of the plaintiff's goods: that the warrant was delivered to the defendant, under which he, as collector, justified taking the goods as a distress, and prayed judgment and a return. Plea in bar de injuria sua propria absque tali causa.

Special demurrer, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not a justification and claim of right:—Held, that the plea in bar was good. *Bardons and others v. Selby*, E. 1833. 430

Where several acts of assault and imprisonment are alleged in separate counts, the circumstances relied on as justifying them must be directed to each different occasion on which the defendant is charged with a trespass; and it is not sufficient to

confess in each plea the several acts of trespass laid in every count, if the defendant only seeks to avoid them by stating one cause for the whole, even though that cause be continuing, and the pleas do not state the trespasses in the first and other counts to be the same and not other or different. *M'Curdy v. Driscoll and others*, E. 1833.

Defendant having charged plaintiff with felony, the plaintiff was taken up for it under a justice's warrant. At a hearing before the justice, the plaintiff was let go on his promise to re-appear in a week; upon which the defendant said he had another charge of forgery against him; the plaintiff was stopped by an officer and again put to the bar, but dismissed on a similar promise:—Held, that plaintiff's remedy against the defendant was in case and not in trespass. *Barber v. Rollison*, H. 1833. 266

Goods were sold for ready money, and packed up at the seller's house in boxes furnished by the purchaser, who saw the packing and requested the seller to keep them for him till he could call, pay for, and take them away:—Held, that on a count for goods sold and delivered, plaintiff was rightly nonsuited. *Boulter v. Arnott*, H. 1833. 267

Laying under a videlicet. 450

Effect of not pleading afresh after amendment of declaration and leave to defendant to plead de novo. *Fagg v. Borsley*, T. 1833. 905

Count for land bargained and sold, 963

See *Boydell v. M'Michael*, 974.

Describing quarter sessions in pleading. *Slack v. Wilkin*, M. 1832. 158

## POOR RATE.

Avowry of distress for. 430

## POWER.

A power of appointment was given by will to be by *M. S.* duly executed and published under her hand and seal, in the presence of and attested by three or more credible witnesses. *M. S.* signed, sealed, and delivered as and for her last will, an instrument ending and attested thus: "In witness whereof I have set my hand and seal hereto this 5th day of August, A. D. 1801, in the presence of the underwritten *Mary Swift*." (L. S.) Opposite this "Signed, sealed, and delivered, this 5th day of August, 1801, as the last will and testament of the said testatrix *M. S.*, who in her presence and in the presence of each other, have put our names as witnesses thereof: *H. F., J. G., R. F.*":—Held, that the power was well executed and the will valid. *Ward and others v. Swift and others*, M. 1832. 122

A pauper settled in *G.*, resided for some time in the neighbouring parish of *St. F.*, being relieved there by *G.* The relief was discontinued on the ground of his not being resident in *G.* The pauper afterwards was taken ill with consumption. After the plaintiff, a medical man, had attended him eight or nine weeks, he sent a letter by the pauper's wife to the overseers of *G.* After reading it, one of them said that the plaintiff had been attending the pauper some time before then. They thereupon renewed their former weekly allowance for maintenance, and continued it until the pauper's death, but neither prohibited the plaintiff to attend the pauper or furnished him with other medical assistance: Held, that they were liable to pay so much of the plaintiff's bill for medicines &c. as was incurred after the letter was received. *Paynter v. Williams and another*, T. 1833. 894

**PRACTICE.**

*(Affidavits.)*

May be used in shewing cause, though sworn after the time named in the rule for shewing cause. *Hicks v. Marreco*, M. 1832. 216

*(Security for costs.)*

If assignees of a bankrupt go on with an action brought by him before he became bankrupt, they must find security for the costs incurred, as well before as after the fiat. When the action was brought in *Easter* term, and a fiat was issued against the plaintiff on 2d Nov., and before the next *Easter* term the assignee gave notice of trial for the sittings after *Easter* term, the motion for security for costs was allowed late in that term. *Mason v. Polhill*, E. 1833. 595

*(Notice of trial.)*

Short notice of trial in country causes means four days peremptorily, whatever may be the state of the pleadings. *Lawson v. Robinson*, E. 1833. 490

*(Notice of continuance of trial.)*

Two days notice of continuance of trial to another sittings must be given, exclusive of a *Sunday*. *Wardle v. Ackland*, T. 1833. 819

*(Judge at chambers.)*

*Semble*, that a judge sitting at chambers has no power out of term to quash a demurrer, even if it appear to be sham, and pleaded for the purpose of delay. *Foster and others v. Burton*, H. 1833. 388

Though a judge at chambers cannot set aside a judgment for irregularity, he may on summons order a stay of proceedings till the 4th day of the next term inclusive, to afford opportunity for a motion. See *Rutty v. Auber*, E. 1833. 591

*(Notice of filing declaration.)*

Where a declaration *de bene esse* is

filed, if an appearance is entered before notice given of the filing the declaration, the declaration and subsequent proceedings will be set aside. *Weddle v. Bramer*, M. 1832. 237

*(Rule to plead.)*

Writ, declaration, and rule to plead, all occurred in the same vacation. In the next term judgment was signed:—Held good, and that it was not requisite to give a new rule to plead in the term. *Mould v. Murphy*, E. 1833. 588

Declaration of *Easter* term, rule to plead of same term. Judgment was signed in *Trinity* term:—Held good, without fresh rule to plead of that term. *Pryer v. Smith*, T. 1833. 820

*(Entitling rule.)*

The served copy of a rule must be entitled in the cause, and the appearance of the party served by counsel does not cure the omission. In *re Wood v. Critchfield*, M. 1832. 235

*(Discharge for debt under 20l.)*

In order to have a rule absolute in the first instance to discharge a defendant who has been in custody twelve months for a debt under 20l. pursuant to 48 G. 3. c. 123., notice of the motion must be given; and as by the act it must be made in term time, the rule must be drawn up to show cause in term, and not at chambers in vacation. *Jones v. Fitzaddams*, T. 1833. 904

*(Imparlanee.)*

Since Reg. Gen. *Trin.* 1 W. 4, where a writ is returnable and the appearance entered of one term, but the declaration is of a subsequent term, the defendant is entitled to an imparlanee; and an execution had before the time of such imparlanee has expired, was set aside. *Whalley v. Barnet*, M. 1832. 239

A defendant who has not appeared is not entitled to an imparlance; in the Exchequer the plaintiff has four terms in which to enter a common appearance for defendant under 12 G. 1. c. 29. s. 1. *Cook v. Allen*, H. 1833. 378

(Irregularity.)

Service or knowledge of copy of process itself must be denied in order to set aside proceedings for irregularity and want of service of process. *Cohen v. Watson*, M. 1832. 238

The court set aside a writ of summons in assumpsit for irregularity for not strictly pursuing the form laid down in 2 W. 4. c. 39, Sched. Form No. 1. *In re King v. Skeffington*, H. 1833. 318

A notice of declaration is irregular if it would include a different form of action from that in the writ. *S. C.*

A rule for setting aside the service of a writ for irregularity was discharged on its being shown for cause that the irregularity occurred in the writ itself. *Hasker v. Jarmaine*, H. 1833. 381

Since the Uniformity of Process Act, 2 W. 4. c. 39., the writ is the commencement of the suit, and not merely process to bring a party into court. Therefore a declaration in a form of action, not warranted by the writ, will be set aside as irregular. The plaintiff may declare afresh if his cause of action will admit of declaring in the form warranted by the writ. *Thompson v. Dicus*, T. 1833. 873

And see *Alston v. Undershill*, 427. Since 2 W. 4. c. 39. s. 11., if process is irregularly served early in a vacation, the defendant should apply to a judge at chambers, and not wait till the four first days of term. *Cox, assignee of Sheriff of Middlesex, v. Tullock*, E. 1833.

An appearance was entered for the defendant in due time on 10th January, but not being found in the appearance book on search by the plaintiff's attorney, he entered a common appearance for him on the 21st, proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. He signed judgment on 4th Feb. and levied execution thereon on the 19th. The defendant's attorney then said that he had entered an appearance for the defendant: Held, that though that entry of appearance made the demand of plea necessary, yet as the plaintiff's attorney was suffered to remain in ignorance of it, after he committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed on the 26th January, the judgment must stand. *Rutty v. Auber*, E. 1833. 591

(Supersedeas.)

A prisoner in execution, who has become supersedeable on the ground of not having been charged in execution during two terms, is entitled to his discharge, notwithstanding he is afterwards charged in execution on the same judgment before the motion for a supersedeas. *Hewitt v. Mellon*, E. 1833. 503

(Supersedeas charging in execution.)

The rule charging a defendant in execution need not be lodged at the prison the same day the defendant is charged in execution. *In re Blandy and others v. Webb*, M. 1832. 235

(Insolvent debtor—Supersedeas.)

A prisoner who petitioned the insolvent court for his discharge, but did not follow the directions of 7 G. 4. c. 57., by filing his schedule within fourteen days after, or by giving notice to his creditors of

having filed his petition, will not, however, be discharged as super-sedable for want of a declaration before the end of the second term, for the petition is still valid for the purpose of adjudication intended by sect. 15. *Molynaux and others v. Browne, a prisoner*, T. 1833.

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*(Term's notice.)*

If after a rule for a new trial has been made absolute, the party succeeding on that rule suffers more than four terms to elapse without taking the case down to trial, a term's notice of motion is necessary to discharge the rule, as either party may try by proviso. An order to change an attorney is not a proceeding in a cause dispensing with a term's notice of proceeding. *In re Deacon v. Fuller*, H. 1833.

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*(Arguing demurrer.)*

Where a general demurrer was delivered for delay just before the end of term, the court granted a concilium on the last day of term, and gave judgment for the plaintiff at the rising of the court, refusing to let defendant in to plead. *Wilson v. Tucker*, T. 1833.

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Where there are cross demurrers. *Forbes v. King*.

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## PRICE.

*In*gredient in construing equivocal contract. See 907.

## PRISONER.

A prisoner in the criminal custody of the marshal of the K. B. may be brought up by habeas corpus under 2 W. 4. c. 39. s. 8, in order to detain and charge him with a declaration. *Ess v. Smith and another*, H. 1833.

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## PROMISSORY NOTE.

See *BILLS AND NOTES*.

## PURCHASER.

Technical and popular sense of. *Doe d. Meyrick v. Meyrick*. 916

## QUÆ SUNT EADEM.

See *PLEADING*.RATI HABITIO MANDATO  
EQUIPARATUR, 894.RECOGNIZANCES FOR-  
FEITED.

Requisites for moving for relief against. *Rex v. Houlden and Clough*, E. 1833.

Indictments for assault had been traversed on recognizances by defendant and two sureties to appear, enter, and try the traverses at the next sessions; the traverser gave the prosecutor no notice of trial before the next sessions, but moved there to respite the recognizances to the next session; which application was refused, and they were ordered to be estreated. Warrants of execution issued under 3 G. 4. c. 46. s. 6., against the defendant and his sureties, on motion to bring the recognizances, estreats, and warrants into the Court of Exchequer:—Held, that the court had no jurisdiction over estreats not returned into it, and that the quarter sessions only had jurisdiction to relieve. *Rex v. Thompson*, M. 1832. 53

## REGULÆ GENERALES.

*Michaelmas Term*, 3 W. 4. 1832. 1  
*Hilary Term*, 3 W. 4. 1833. 241  
*Trinity Term*, 3 W. 4. 1833. 985

(Construction of. See *PRACTICE*.)

3 U



**RENT.**

The plaintiff granted to the defendant a lease, which, after stipulating that not more than one-third of the land should be in cropping in any one year, reserved a yearly rent of 50*l.*, and also a further yearly rent of 5*l.* for every acre ploughed up or continued in tillage contrary to the lease. A declaration in covenant alleged that defendant in one particular year cropped more than one-third of the land demised; and sought to recover half a year's additional rent:—Pleas, first, that the plaintiff, with a full knowledge of the breaches and of all the matters alleged in the declaration relating thereto, accepted from the defendant 25*l.* as and for all the rent due up to a certain day named, without demanding payment of such penalty or additional rent, and thereby waived his right to receive or recover the same. Secondly, that the plaintiff, with full knowledge of the breaches, &c., waived all claim or right on his part to receive any such penalty, &c.:—Held, that the pleas, whether considered as pleas of tender or of accord and satisfaction, were bad in general demurrer; and that the right of the plaintiff to recover the additional rent by way of stipulated damages was not waived or discharged by any matter stated therein. *Denton v. Richmond*, T. 1833. 630

**REPLEVIN, 107, 170, 430.**

See PLEADING—SHERIFF.

**SALE OR RETURN.**

See ARREST.

**SCIRE FACIAS.**

The court will not allow the plaintiff

to sign judgment in scire facias pursuant to Reg. Gen. Hil. 2 *W.* 4. No. 81, on two returns of nihil to two writs of scire facias, where it does not appear that attempts have been made to give the defendant notice. *Sabine v. Field*, H. 1833. 388

**Against Bail.**

See BAIL.

**SECURITY FOR COSTS.**

See PRACTICE.

**SHERIFF.**

See BAIL.

Where a sheriff had taken goods in execution, and on an adverse claim being made to them obtained a rule under 1 & 2 *W.* 4. c. 58. s. 6. to which the claimant did not appear, the court barred the claim and ordered him to pay the execution creditor his costs of shewing cause against the rule, unless cause was shewn in six days from service of such order. *Perkins v. Benton*, M. 1832. 51

A sheriff may take one pledge in replevin for distraining cattle damage feasant. A count stating that the sheriff, instead of taking a bond from the plaintiff in replevin and two sufficient sureties, took a bond from the plaintiff in replevin and one surety, who was alleged to be insufficient, is bad in not alleging that the plaintiff in replevin was insufficient. *Hucker v. Gordon*, M. 1832. 107

A declaration against a sheriff for taking insufficient pledges in replevin, should shew that a writ of "retorno habendo" had been issued and "elongata" returned thereon. A count against a sheriff for not restoring the goods is bad, for his duty, under stat. 13 *E.* 1.

West. Sec. c. 2., is only to take pledges to that effect. *S. C.*

In order to exonerate a sheriff from returning a *fi. fa.* on the ground that the defendant is a privileged servant of a foreign minister, under 7 *Ann. c. 12. s. 5.*, his acts of attendance on and actual "bonâ fide" service of the ambassador must be clearly shewn. *Quære*, what goods of a person actually privileged would be protected from execution. *Fisher and others v. Begrez, M. 1832.* 184

*Semble*, that a chorister bonâ fide hired and paid by an ambassador to assist in the Roman Catholic ritual in his chapel for himself and suite, and attending there to do that service, is within 7 *Ann. c. 12. S. C.*

If the sheriff has paid over the produce of an execution to a judgment creditor, he is too late to move for relief under 1 & 2 *W. 4. c. 58. s. 6.* *Chalon v. Anderson, M. 1832.* 237

A sheriff obtained judgment on a bail bond, and issued a *fi. fa.* directed to the coroner, on which the plaintiff's attorney indorsed the name of a sheriff's officer as the person pointed out to the coroner to execute the writ. That officer took goods in execution and sold them, and received the purchase money, but did not pay it over to the plaintiff. The goods being afterwards taken from the purchaser by persons claiming a prior right, he sued the sheriff for the purchase money, as for money had and received to his use on a bill of consideration. Held, he could not recover in that way, for the act of the officer was done by him as officer to the coroner, and the sheriff was not connected with it so as to make him liable. *Sargent v. Cavan and another, Sheriff of Middlesex, E. 1833.* 536

A sheriff seized goods under a *fi. fa.* before 14th December. On that day a baron at chambers stayed proceedings till the 4th day of *Hilary* term, to enable defendant to move for a rule to set aside the judgment and execution for irregularity. It was obtained accordingly, and discharged on the 22d. On the last day of term, the 31st, the sheriff moved under the adverse claim act, 1 & 2 *W. 4. c. 56.*, for protection against a claim by defendant's brother to the goods seized. Part of the goods had been sold, and the rest removed. Held, that a sheriff must come promptly, and in this instance he came too late, in not moving within the four first days of *Hilary* term, or, at all events, sooner after the 22d, when the rule to set aside the judgment was discharged. *Semble*, that under 1 & 2 *W. 4. c. 56. s. 1.*, the sheriff should also have denied collusion. *Cook v. Allen, 1833.* 586

Whether a sheriff, who in obedience to a *fieri facias*, seizes the goods of a person who has committed an act of bankruptcy previously to issuing the execution, is liable in trover by the assignees of the latter.—*Quære. Garland v. Carlisle, Assignee of Leonard, a Bankrupt, in Error, 1833.* 705

### SHIP.

In an action for running down a ship a plaintiff may recover if he was not in fault in not trying to prevent the collision; but had he been so in fault, or had both parties been in the wrong, he cannot recover. *Vennall v. Garner, M. 1832.* 85

### SLANDER.

*See LABE.*

The plaintiff was appointed by a leet jury and sworn in by the steward, chamberlain of commonable lands

in a particular parish, belonging to certain freemen. It appeared that such chamberlains were sworn in yearly, and had no salary. Their duties were to receive certain sums for agistment and other use of the land for races, &c., and to drain and keep it in order out of such funds. They were to account for any surplus to two aldermen of a corporation, and to pay over any balance in hand to their successors in office:—Held, that such a chamberlain was not a servant or person employed in that capacity within the embezzlement act, 7 & 8 G. 4. c. 29. s. 47. *Williams v. Stott*, T. 1838. 688

Where, in a declaration for slander, an innuendo ascribes to certain words a particular meaning, which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated by the plaintiff so as to let him in to prove the words to have another meaning. *S. C.*

*Quære*, if the verbally imputing fraudulent embezzlement to such a chamberlain be actionable? *S. C.*

### STAMP.

Several persons signed an agreement to pay their portion of costs incurred in defending particular suits, rateably according to the sums subscribed by each, and set opposite their respective names. The words of the agreement when counted with each sum and signature, as far as and including that of the defendant, amounted to less than 1080 words; the result was similar on counting the words of the agreement with the signatures but without the sums; but on adding all the signatures and all the sums to the words in the body of the agreement, it proved to contain more than 1080 words:—Held, that it

being necessary to read every sum and signature in order to ascertain the proportion payable by each subscriber, a 1*l.* 15*s.* stamp was necessary. *Linley and others v. Clarkson*, H. 1833. 352

Country bankers entered into bond conditioned to secure town bankers from loss by paying bills, &c. for the former, the condition expressly stipulating that all the monies to be ultimately recoverable on the bond should not exceed 1000*l.*—Held, that a 5*l.* stamp was sufficient, 55 G. 3. c. 184. sched. tit. Bond. *Loyd and others v. Heathcote and others*, 1833. 309

At a meeting of the parties to a deed of settlement on a marriage, the father of the intended husband, who was the only conveying party, executed and delivered the deed. Just after, and before any other person had executed, the father of the intended wife objected to a clause giving a power of revocation; upon which the father of the husband immediately agreed that it should be struck out; that was accordingly done, the conveying party re-executed, and the others executed:—Held, that no fresh stamp was rendered necessary by the alteration, the deed being only in fieri when it took place. *Jones v. Jones*, T. 1833. 890

### STATUTES.

52 H. 3, c. 4. (Excessive charge for distress.) 260  
 13 Edm. 1. West. Sec. c. 2. (Replevin.) 107  
 1 R. 2. c. 12. (Debt for escape.) 361  
 32 H. 8. c. 1. (Will.) 79  
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 34 & 35 H. 8. c. 4. (Bankrupt.) 746, 755  
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| 21 <i>J. 1. c. 19. s. 9. (Bankrupt.)</i>                            | 731, 747, 757, 777 | 23 <i>G. 3. c. 58. (Legacy Duty.)</i>                                     | 23                     |
| 16 <i>C. 2. c. 7.</i>                                               | 931                | 29 <i>G. 3. c. 51. (Legacy Duty.)</i>                                     | 23                     |
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| 29 <i>C. 2. c. 3. s. 10. (Seizing term under fi. fa.)</i>           | 339                | 41 <i>G. 3. (U.K.) c. 109. (Inclosure act.)</i>                           | 87                     |
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| 29 <i>C. 2. c. 3. s. 17. (Sale of goods.)</i>                       | 959                | 43 <i>G. 3. c. 46. s. 2. (Arrest for more than recovered.)</i>            | 232, 486, 586          |
| 30 <i>C. 2. c. 7. (Devastavit.)</i>                                 | 821                | 43 <i>G. 3. c. 99. (Assessed Taxes.)</i>                                  | 91                     |
| 4 & 5 <i>W. &amp; M. c. 24. s. 12. (Devastavit.)</i>                | <i>ib.</i>         | 44 <i>G. 3. c. 98. (Legacy Duty.)</i>                                     | 10, 859                |
| 8 & 9 <i>W. 3. c. 11. s. 2. (Costs of demurrer.)</i>                | 386                | 45 <i>G. 3. c. 23. (misprinted 38.) (Legacy Duty.)</i>                    | 14, <i>et seq.</i>     |
| 8 & 9 <i>W. 3. c. 11. s. 8. (Breaches.)</i>                         | 410                | 46 <i>G. 3. c. 65. (Bankruptcy.)</i>                                      | 731                    |
| 4 <i>Ann. c. 4. (Bankrupt.)</i>                                     | 748                | 46 <i>G. 3. c. lxxxvii. (Southwark Court of Requests.)</i>                | 161 n.                 |
| 4 <i>Ann. c. 16. s. 6. (Pleading.)</i>                              | 153                | 47 <i>G. 3. c. xxxvi. (Tipton Court of Requests)</i>                      | 145                    |
| 6 <i>Ann. c. 22. (Bankrupt.)</i>                                    | 748                | 47 <i>G. 3. Sess. 1. c. civ. (Blackheath, &amp;c. Court of Requests.)</i> | 161 n.                 |
| 9 <i>Ann. c. 14.</i>                                                | 931                | 48 <i>G. 3. c. 1. (Paymaster of Exchequer Bills.)</i>                     | 509                    |
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| 12 <i>G. 1. c. 29. (Entering appearance for defendant.)</i>         | 379                | 49 <i>G. 3. c. 88. s. 8. (Bastardy.)</i>                                  | 824 n.                 |
| 2 <i>G. 2. c. 23. s. 23. (Attorney's bill.)</i>                     | 193                | 55 <i>G. 3. c. 184. Sched. Part 1. tit. Agreement. (Stamp.)</i>           | 354                    |
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- 6 *G. 4. c. 16. (Bankrupt.)* 733, 758  
 6 *G. 4. c. 16. s. 98.* 894 n.  
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*In re Chobmondeley.*

## SUBPŒNA.

See WITNESSES.

## SUBSCRIBING WITNESS.

See EVIDENCE.

## SUGGESTION OF BREACHES

*Under 8 & 9 W. 3. c. 11. s. 8.*

Where, in debt on bond, the plaintiff has suggested breaches on the roll, pursuant to 8 & 9 *W. 3. c. 11. s. 8.*, the court, after plea of non est factum pleaded, refused a rule to shew cause why some of them should not be struck out, or judgment by default suffered on them with entry of nominal damages; for by that statute the plaintiff may suggest breaches on every part of the condition, and the jury may inquire of the truth of them, and the defendant had another course, viz. by pleading performance of the condition and suffering judgment by default on the replication. *Canterbury, Archbishop of, v. Robertson, E. 1833.* 390 n.

## SUPERSEDEAS.

See PRACTICE.

## SURETY.

Action against a surety on a bond given by a collector of assessed taxes and the defendant as his surety:—Held on demurrer, that it is no defence to plead that the commissioners and receiver-general had not complied with certain directory parts of the statutes relating to assessed taxes, which lay down methods for obtaining payments from collectors. *Wilks and another v. Healey, M. 1832.* 91  
 In order to take advantage of the proviso in 43 *G. 3. c. 99. s. 13.*, that no bond shall be put in suit against a surety for a collector for any deficiency other than shall re-

main unsatisfied after a sale of lands, &c. of such collector, the plea must aver that there were lands, &c. of the collector which might be seized and sold to supply the deficiency. *S. C.*

## SURRENDER OF TENANCY.

See **LANDLORD AND TENANT.**

By act or operation of law, *Graham v. Whickelo.* 201

## TENDER.

See *Reay v. Whyte*, tit. **COMPOSITION.**

## TERM FOR YEARS.

See **EXECUTION.**

## THEN AND THERE, §15.

## TIME, 493.

## TRAVERSE.

See **PLEADING.**

## TREES.

Planting, see *Allen v. Cameron*, tit. **CONTRACT.**

## TRESPASS, PLEADING IN.

See **PLEADING.**

Trespass lies against master for the act of his servant, where, while the servant drives his master in a gig, the horse runs away and does damage. *Chandler v. Broughton*, M. 1832. 220

## TRIAL, COURSE AT.

Where a plaintiff is able to establish two demands against a defendant, but abstains from proving more than one in the first instance, on which the defendant proceeds to prove a set-off to a larger amount, the judge may in his discretion suf-

fer the plaintiff to prove his other demand in reply, so as to overtop the cross-demand set up by the defendant. *Williams v. Davies*, H. 1833. 383

## TROVER.

Proceedings by assignees of a bankrupt against the sheriff, for the value of goods of the bankrupt improperly sold by him under an execution will not be stayed, unless the plaintiffs agree as to the amount to be recovered. *Gibson and another v. Humphrey and another*, E. 1833. 588

The plaintiff pawned a watch, and afterwards gave defendant the duplicate to get it out of pledge. Defendant took it out accordingly on paying the advance and interest. Plaintiff's agent claimed the watch from defendant, saying, plaintiff would of course pay what had been advanced to redeem it. The defendant said he had not got the watch, and would not tell who had. Held, that that was evidence of a conversion to sustain a verdict for the plaintiff in trover, and that the plaintiff was not bound to tender the defendant the sum paid on account of the watch, as the defendant had not got it ready to deliver to him in return. *Jones v. Cliffe*, E. 1833. 676

## UNITY.

Of ownership or possession. See *Barlow v. Rhodes*, tit. **WAY.**

## VENUE.

If a motion to change the venue rests on special grounds, it ought not to be made till after plea pleaded. *Cotterill v. Dixon*, T. 1833. 705  
The venue will not be changed in an action on a written but unstamped agreement. *Slack v. Chew*, one, &c. T. 1833. 810

A rule to change the venue obtained, though the defendant is under terms to plead issuably. *Russell v. Hurst*, M. 1832. 218

### WALES.

Power of sessions over insolvents in. 341 n.

### WARRANTY.

The buyer of a horse on a warranty of soundness can only recover for breach of it in an action for damages, and unless both parties agreed to rescind, or unless in the original contract it was stipulated to be rescinded if any breach of it took place; the buyer cannot sue the seller for money had and received as for a failure of the original consideration, therefore he has not reasonable or probable cause for holding him to bail within 43 G. 3. c. 46. s. 3. *Gompertz v. Denton*, M. 1832. 232

### WAY.

The course of an ancient footway, leading from one highway to another, was over some old inclosures, and from thence across a few yards of waste land into the highway; the commissioners, under a local act for inclosing the waste, allotted to the plaintiff that part of it over which the way ran; the act did not empower them to stop up or set out ways over old inclosures, and their award did not mention the way in question, or set out any new way in lieu of it. Held, that s. 11 of the general inclosure act, 41 G. 3. (U. K.) c. 109. did not operate to extinguish the old way. *Thackrah v. Seymour*, M. 1832. 87

Where one seised in fee of premises, and of the soil over which a way not of necessity has been used by the occupier of them, grants those premises, with all ways, roads, &c.

to the same belonging or in any wise appertaining, no way will pass unless legally appurtenant, or unless it appears from the grant itself that the parties meant to use the word in a sense more extended than the legal one. *Semble*, such intention cannot be collected from parol matter dehors the deed. *Barlow v. Rhodes and others*, H. 1833. 280

And see *Doe d. Meyrick v. Meyrick*, tit. WILL.

### WATCHMAN.

See CONSTABLE.

### WILL.

See POWER.

Matter purporting to be a will of lands, but unexecuted, was written on the two first sides of a sheet of paper, on the third side of which a codicil, entitled "Codicil," and referring to the foregoing will, was afterwards written, and was duly signed and attested. Held, that that due execution gave effect to the will, and conferred on it validity to pass lands. *Doe dem. Williams v. Evans*, M. 1832. 56

A will subscribed by three witnesses in testator's presence, and at his request, is duly executed, so as to pass real property, though the testator did not sign it in the presence of any of them, and only two saw his signature. *Johnson v. Johnson*, M. 1832. 73

A reversioner expectant on the determination of a term of years created on mortgaging premises for 1200l. devised the same by will duly executed and attested; by subsequent deed he agreed with A. that A. should pay off the old mortgage, and take an assignment of the subsisting term to secure the 1200l. and a further loan of 1800l. The 1200l. was paid off first, and the term was in the meantime to be

assigned to *B.* in trust for the deviser, which *B.* afterwards, on *A.*'s paying deviser 1800*l.* was to assign to *A.* The 1200*l.* was paid off accordingly, and the term was assigned to *B.* in trust for the testator, his heirs and assigns, to be assigned and disposed of as he or they should direct or appoint, and the term was soon afterwards assigned by *B.* the trustee, by direction of deviser, to *A.* to secure the two sums of 1200*l.* and 1800*l.* Held, that the will was not revoked, for the deviser's estate (*viz.* his reversion) was unaltered by the assignment of the term to a fresh mortgagee. *S. C.*

A court of common law will decline to decide a question arising on an issue directed to it out of Chancery, and which involves a right merely equitable, particularly *comm. semb.* where the rules of law and equity differ on the question.

*S. C.*

A testator, having first charged such part of his property as would be necessary to pay his debts, devised to *R. C.* a house, &c. lately in the possession of *G. S.* of *W.* or his mortgagee, the said property being and lying in the township of *W.*; he also devised to *R. C.* all the share, right, and property of the *H.* estate, situate, &c. Held, that the devised premises in *W.* being themselves charged with the debt, and neither the devisee nor the estate he acquired by the devise, subsequent to the charge being so charged, the devisee, *R. C.* took only an estate for life in the premises in *W.* *Doc dem. Clarke v. Clarke, M. 1832.* 120

By a will premises were demised to *E. M.* the testator's wife, for life, and after her decease to my nephew *M. M.* and his right heirs. Then followed, "Also I give and bequeath unto my nephew *M. M.*

of the village of *M.* (other premises described in the will) to him and his right heirs after my decease." Testator had two nephews, named *M. M.*, one living at *M.* where the testator lived, the other at *M. T.* The proof of that fact was held at nisi prius to raise a latent ambiguity, which might be explained by admitting parol evidence of the declarations of testator at the time of making his will, and the court refused to disturb the verdict. *Doc dem. Morgan Morgan v. Mary Morgan, M. 1832.*

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*R. P.* devised his real estates to his cousin *T. P.* for life, and after his decease devised as well his real and personal estate, as all accumulations thereof, to such of his the testator's relations of the name of *Pearce* "being a male," as the said *T. P.* should by deed or will give or nominate or appoint; and in default of such gift or appointment by *T. P.*, testator devised the same to "such of his, the testator's relations, of the name of *Pearce*, being a male, as *A.* should approve of or adopt," if living at the decease of the said *T. P.*, his heirs, executors, administrators, and assigns for ever; and in case no such male relation should be so adopted, or such adopted male relation should not be living at *T. P.*'s decease, then testator devised the same "unto the next and nearest of kin of him the said testator of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one, of equal degree, living at his the said testator's decease, his heirs, executors, administrators, or assigns, for ever." After this, testator gave to *T. P.* the presentation to a living to present to at all times during his life, and gave his plate, household goods, &c. to his executors, in trust to permit



*T. P.* to have, use, and enjoy the same *during his life*, and after his decease, then "*in trust for the persons who should succeed to or inherit his the testator's real estates by virtue of that his will.*"

*T. P.* tenant for life died without issue, and without having executed the power given by the will, to adopt a male relation of the testator. The next or nearest relations, or nearest of kin of the testator, of the name of *Pearce*, being males, at the time of his death, were his three first cousins; 1st, the tenant for life *T. P.*; 2dly, *R. P.* the plaintiff; and 3dly, *W. P.* his brother. Testator had had a brother *Zachary*, who if then alive, or his son, had he left one, would at the testator's death have been the testator's next and nearest relation, &c. but *Zachary* had gone to sea, and had not been heard of for many years, nor was any male issue of his known to have existed. Held, that if *Zachary*, the testator's brother, died without issue in the lifetime of the testator, *T. P.* took under the ultimate limitation of the will an estate in fee simple in the testator's real property, and an absolute interest in his personality. *Pearce v. Vincent*, T. 1838. 663

Cases as to propounding instructions for will, as a testamentary paper. 276 n.

*A.* died possessed of family estates, as well as of land bought by himself, and other land acquired by exchange of some of the family property for it. Among the land acquired by such exchange was that in question. He devised all his lands &c. and real estates whatsoever which he had heretofore from time to time purchased from the different persons in the several deeds and conveyances thereof named &c. to his sisters, *A. M.* and *E. M.* Held, that the

estate acquired by the testator in exchange passed to the devisees as part of the purchased estates described in the will. *Doe & Meyrick v. Meyrick*, T. 1838. 916

The words of a will were these: "I give all my personal, leasehold, mortgages and freehold estates, goods, ready money, chattels, wheresoever and whatsoever, to my brother *T. D.* in trust for my nephew and nieces *J. D.*, *A. D.*, *M. A. D.* and *Emmy D.*, when the younger (*Emmy*) shall come of age; also if my brother *T. D.* should have children, then his children to have equal share with my four before-mentioned nephew and nieces; he my brother *T. D.* to pay for their education and maintain them if any is wanted, he paying himself for any trouble he may be at, and he living at free cost in the house I now occupy, keeping *Sarah* my servant, if they can agree, and if not, to give her one shilling a week for life."—Held, that under these words the nephew and nieces named by the testator were entitled to the rents and profits of his estate, when the younger, *Emmy*, came of age, subject to the right of any child or children born to *T. D.*, to share equally with them in the rents and profits accruing after the time of his, her, or their births, and to be educated and maintained under the clause in the will:—Held also, that the testator did not mean the house to be given up by *T. D.* when *Emmy* attained twenty-one. *Darker v. Darker and others*, T. 1838. 941

#### WITNESS.

The original subpoena ad testificandum should be shown to the party subpoenaed at the time the copy of it is served, or an attachment will not lie against him for disobedience. *Wadsworth v. Marshall*. 183

Expenses of bringing over witnesses from abroad, of subsisting them here, and of their return, may be allowed, at the discretion of the master, subject to the review of the court, as well since 1 *W. 4. c. 22.* as before. *Macalpine, administratrix, v. Powles and another*, T. 1833. 871

An action on the case lies against a witness for not attending a trial in pursuance of a subpoena, though the plaintiff withdrew the record in consequence of his absence without the jury being sworn. *Mullett v. Hunt*, T. 1833. 875

In such an action it is necessary to allege distinctly in the declaration that there was a good cause of action in the original suit; but an allegation that the defendant could have given material evidence for the plaintiff, without which the plaintiff could not safely proceed to trial, and that by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced to, and did, withdraw the nisi prius record, was held sufficient after verdict. *S. C.*

An allegation that the subpoena was made known to and shown to the defendant was held to be supported by evidence that the subpoena was made known to, and conduct money taken by him, though the original subpoena was not shown, it not ap-

pearing that he requested to see it. *S. C.*

The plaintiff in an action for use and occupation had two witnesses to speak to the occupation. One of them could also have rebutted the defendant's expected set-off, but did not appear upon his subpoena. The cause was called on in the absence of counsel on both sides, and the record withdrawn by the plaintiff's attorney, who swore that he withdrew the record solely on account of the absence of the witness. Held, that the witness was liable to be sued accordingly. *S. C.*

As to one defendant, bankrupt, being witness for another. 201

### WRIT.

A court will not set aside a return of non est inventus to a capias on affidavits of collusion between the sheriff and defendant. If the return be good on the face of it, it can only be impugned in an action for a false return. *Goubot v. De Crouy*, T. 1833. 906

It is sufficient, within 2 *W. 4. c. 39.* to describe a defendant in a capias (Form No. 4,) as of *Kent Street*, in the county of *Surrey*. A capias is good if indorsed "Bail for 40*l.* and upwards." No date is required to the indorsement. *Webb v. Lawrence*, T. 1833. 907

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